Supreme Court, U.S.
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92-489

No.

In The

Supreme Court of the United States

October Term, 1992

ELPIS SAKARIA,

Petitioner,

v.

ALLSTATE LIFE INSURANCE COMPANY
MINNESOTA MUTUAL LIFE INSURANCE COMPANY
AMEX LIFE ASSURANCE COMPANY,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Jay S. Bybee
6515 Millstone Drive
Baton Rouge, LA 70808
(504) 388-8701

Ronald D. Maines
(Counsel of Record)
Maines & Harshman, Chrtd.
Suite 900
2300 M Street, N.W.
Washington, DC 20037
(202) 223-2817

Attorneys for Petitioner,
Elpis Sakaria

September 16, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below correctly held that the standard for awarding sanctions under the "bad faith" exception to the American Rule is "objective reasonableness."

2. Whether, assuming *arguendo* that the "objective" standard applies to sanctions under the American Rule, it was proper to sanction plaintiff following summary judgment for "her continuation" of the suit when her attorney was simultaneously sanctioned for "fail[ing] to advise plaintiff to dismiss the case in light of a lack of admissible evidence."

LIST OF PARTIES

The parties below were Elpis Sakaria, plaintiff-appellant before the Fourth Circuit; William Huffman, appellant; and Allstate Life Insurance Company, Minnesota Mutual Life Insurance Company and Amex Life Assurance Company, defendants-appellees before the Fourth Circuit.

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Petition For A Writ Of Certiorari
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For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Elpis Sakaria requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit in this case, summarily affirming a judgment of the United States District Court for the District of Maryland.

OPINIONS BELOW

The April 20, 1992 *Opinion* of the United States Court of Appeals for the Fourth Circuit (unpublished) is repro-

duced in the appendix at App. 3a. That court's denial of a petition for rehearing was filed May 19, 1992, and is reproduced at App. 1a. The May 5, 1991 *Report and Recommendation* of the United States Magistrate Judge and the September 9, 1991 *Order* and *Memorandum* of the United States District Court for the District of Maryland (all unpublished) are found at App. 9a, App. 4a and App. 6a, respectively.

JURISDICTION

The Fourth Circuit's denial of the petition for rehearing was entered on May 19, 1992. On August 7, 1992, Chief Justice Rehnquist extended the time for filing the instant petition to and including September 16, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Petitioner Elpis Sakaria is the widow of Jagdish Sakaria, the holder of accident insurance policies issued by respondents, Allstate Life Insurance Company, Minnesota Mutual Life Insurance Company and Amex Life Assurance Company (insurers).

In December, 1985, Jagdish Sakaria was a passenger aboard a TWA flight from Washington, D.C. to Athens, Greece. Shortly before Mr. Sakaria's flight landed in Rome, terrorists attacked a departure lounge at the airport, killing fifteen persons and injuring numerous others. As a result, Mr. Sakaria's flight was held on the runway for at least one and a half to two hours before the passengers were permitted into the terminal.

When Mr. Sakaria arrived in Athens, he was met by Nicholas Bafitis, a close family friend, and Labros Stamolous, his father-in-law. Mr. Bafitis stated that Mr. Sakaria, on disembarking from the plane, was "extremely pale and

yellow," that his eyes were "swollen," and that he looked "terrified." App. 7b. Mr. Sakaria related that the captain had informed the passengers that there was fighting at the airport, the plane had been parked on the airfield in Rome with the air conditioning shut off, and that it was "suffocating" inside the cabin. He talked excitedly about the terrorist attack and reported seeing bodies, covered with sheets, when he visited a men's room in the Rome airport. Mr. Sakaria refused dinner that evening and the following day, and remained very agitated, breaking out in tears several times. Sometime during the second night of his arrival, he suffered a heart attack and died. App. 7b-9b.

2. Mrs. Sakaria filed a claim with respondent insurance companies, providing them with medical authorizations, the names and addresses of Mr. Sakaria's physicians, and a narrative of Mr. Sakaria's medical conditions. Respondents denied Mrs. Sakaria's claims. In December, 1987, Mrs. Sakaria filed suit against the insurers, alleging that her husband's death was directly attributable to the "psychological trauma" he suffered during his trip between Washington and Athens. App. 11a.

Although much information had already been provided to the insurers, Mrs. Sakaria responded to insurers' interrogatories concerning, *inter alia*, Mr. Sakaria's "mental and physical condition immediately prior to leaving the United States,"[1] the identity of physicians, psychiatrists and psycholo-

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1 Mrs. Sakaria stated:

> Mr. Jagdish Sakaria was in excellent mental and physical health immediately prior to leaving the United States on December 26, 1985, according to his wife's brother who saw him off in New York Kennedy Airport. He was elated with the thought that he would soon be seeing his child. He had just bought a Santa Claus suit at Jamesway in Laurel, Maryland. He had undergone a physical examination in September, 1985, by Dr. R. Simon, M.D.,

gists Mr. Sakaria had seen prior to his death,[2] and his general medical history.[3] Following receipt of the answers to interrogatories, the insurers' counsel wrote to William Huffman, Mrs. Sakaria's attorney, asserting that the answers did not indicate the existence of admissible evidence to support the claim. The insurers demanded that Mr. Huffman withdraw the suit or they would seek sanctions for "the continued prosecution of this case which has no basis." App. 13a.

Mr. Huffman submitted the statements he had obtained from Mr. Bafitis and Mr. Stamolous to Dr. H. Brandis Marsh, a cardiologist, and asked Dr. Marsh for an opinion as to whether the incident in Rome, as Mr. Sakaria related it and as Mrs. Sakaria understood it to have occurred, could have caused Mr. Sakaria's heart attack. Dr. Marsh opined "to a reasonable degree of medical certainty" that Mr. Sakaria "died as a result of a rhythm disorder caused by a myocardial infarction provoked by the circumstances of travel." App. 14a. Dr. Marsh was subsequently deposed by respondents. When asked to assume that Mr. Sakaria had

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whose report is attached, stating that he had no evidence of heart disease.

2 Mrs. Sakaria answered that Mr. Sakaria was treated by a neurologist in 1979 and "several times thereafter he was seen by Dr. Spiridon Koulouris, M.D., at George Washington University Hospital for follow-up concerning his head injury." App. 3b. As insurers were fully aware from prior correspondence, Mr. Sakaria had suffered brain injury in an automobile accident in 1978, resulting in serious memory problems, depression, and occasional disorientation and paranoid feelings. In fact, from 1978 to 1983 respondent Allstate had excluded Mr. Sakaria from its automobile insurance policy because of this condition. App. 14b.

3 In response, Mrs. Sakaria indicated that her husband "was diagnosed as having a head injury" as a result of an automobile accident in October, 1978, and that he "continued to have partial amnesia," and provided the name of the neurosurgeon who diagnosed Mr. Sakaria's "mental impairment." App. 3b.

not seen bodies or blood at the airport and had not been confined in a stuffy atmosphere aboard the plane, he agreed that he would "not subscribe to the opinion." App. 16a.

In October, 1989, the insurers moved for summary judgment against Mrs. Sakaria, contending that Mr. Sakaria had not been confined in a stifling aircraft or seen the bodies of victims of the attack. The matter was referred to a magistrate judge, who recommended that the case be dismissed because Mrs. Sakaria had not come forward with affidavits or other admissible evidence to establish what had happened to her husband on the airplane or in the Rome airport. Specifically, the record before the magistrate did not include a formal affidavit from Mr. Bafitis or other evidence in the form required by Fed. R. Civ. P. 56. The magistrate's recommendation was adopted by the district court. Mrs. Sakaria did not appeal the dismissal of her case.

3. Following the grant of summary judgment, the insurers moved for the imposition of sanctions against Mrs. Sakaria and her attorneys under Fed. R. Civ. P. 11, 28 U.S.C. § 1927, Md. R. Proc. 1-341, and "the inherent power of the Court." The magistrate recommended sanctions against Mrs. Sakaria and Mr. Huffman on the grounds that they had maintained a frivolous claim and that they had served misleading answers to interrogatories that did not fully inform the insurers concerning Mr. Sakaria's mental condition.

The magistrate concluded that Mr. Huffman had "continued this litigation well past the point of objective reasonableness." App. 22a. While acknowledging that "there was evidence that Mr. Sakaria might have suffered sufficient injury from unexpected exposure to the stressful aftermath of a terrorist attack to cause his death," App. 22a, the magistrate faulted Mr. Huffman for his lack of "vigorous efforts" to support his client's case, particularly to develop facts that would have supported the factual assumptions on which Dr.

Marsh had based his initial opinion. The magistrate recommended that Mr. Huffman be sanctioned under Federal Rule of Civil Procedure 11 for signing the opposition to respondents' motion for summary judgment. *Id.*

The magistrate recommended sanctions against Mrs. Sakaria under the "bad faith exception" to the American Rule. According to the magistrate, sanctions were warranted because Mrs. Sakaria had continued to press her suit and in answers to interrogatories she "claimed her husband was in excellent physical and mental health and that he saw the aftermath of the terrorist attack." App. 23a. But the magistrate made no finding that Mrs. Sakaria had proceeded in bad faith; rather, as with Mr. Huffman, the magistrate also found that she had maintained suit beyond the point of "objective reasonableness." App. 22a. The magistrate recommended sanctions of $4,000 each against Mr. Huffman and Mrs. Sakaria, explaining that Mrs. Sakaria should not be punished more severely than Mr. Huffman "who should have told her not to press this claim." App. 27a.

The district court "adopt[ed] in full" the magistrate's *Report and Recommendation*. In a brief order, the court sanctioned Mr. Huffman pursuant to Rule 11 for failing to develop admissible evidence and "fail[ing] to advise [Mrs. Sakaria] to dismiss the case in light of a lack of admissible evidence." App. 8a. The court reaffirmed that Mrs. Sakaria was not being sanctioned under Rule 11 but rather pursuant to the "bad faith exception" for her statements during discovery and "her continuation of this warrantless suit." The court emphasized that both Mr. Huffman and Mrs. Sakaria had continued suit "well beyond that point where an objectively reasonable person would have dismissed the case." App. 9a.

The court of appeals summarily affirmed the district court's order. App. 4a. The court denied petitioner's

request for rehearing and suggestion for rehearing en banc. App. 2a.

REASONS FOR GRANTING THE PETITION

This case presents the Court with two issues concerning the scope of the courts' inherent power to shift attorneys' fees to unsuccessful parties in civil litigation. First, it raises an issue unresolved in this Court's recent pronouncements on Rule 11 and the American Rule, *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. ____, 111 S.Ct. 922 (1991); *Chambers v. NASCO, Inc.*, 501 U.S. ____, 111 S.Ct. 2123 (1991): Namely, whether the "objective reasonableness" standard applied to Rule 11 also applies to the "bad faith" exception to the American Rule. Second, even if this Court were to agree that the exception to the American Rule now rests on an objective standard, it raises the question whether a party, such as Mrs. Sakaria, who vigorously but unsuccessfully litigates her suit to summary judgment, can be sanctioned for continuing her suit when her attorney has been sanctioned pursuant to Rule 11 for failing to advise her to dismiss her action. When "'what is objectively reasonable for a client may differ from what is objectively reasonable for an attorney,'" (*Business Guides*, 111 S.Ct. at 933 (citation omitted)), under no set of circumstances should such vigorous litigation, taken with the advice of counsel, violate an objective standard. This Court should grant the petition for a writ of certiorari in order to clarify the governing principles in this important and developing area of the law.

A. The Standard When Applying the Bad Faith Exception To the American Rule Should Not Be "Objective Reasonableness."

1. The question presented is substantial because the court below, taking its cue from this Court's recent ruling in *Business Guides* on the standard applicable to Rule 11 sanctions, applied

that same standard to sanctions under the bad faith exception to the American Rule. This result is not only not required by *Business Guides*, but conflicts with the principles articulated by this Court and with the consistent views of the courts of appeals. Indeed, in petitioner's view, to state the question of what standard applies is to answer it. "[T]he essential element in triggering the award of fees is . . . the existence of 'bad faith' on the part of the unsuccessful litigant." *Hall v. Cole*, 412 U.S. 1, 5 (1973).

It is, of course, well established that "[i]n the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 247 (1975). The Court has recognized, nevertheless, that a court possesses "the inherent power to police itself" (*Chambers v. NASCO, Inc.*, 111 S.Ct. 2123, 2133 (1991)) and may "in narrowly defined circumstances" (*Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980)) assess attorneys' fees against a party. But the Court has advised that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 111 S.Ct. at 2132. Under the exception pertinent here, the "bad faith" exception, a court may award attorneys' fees when a party has "'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Alyeska*, 421 U.S. at 258-59 (quoting *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974)).

The lower courts have long held that "bad faith" in this context requires "clear evidence" that the claims are (1) "entirely without color" and (2) "made for reasons of harassment or delay or for other improper purposes." *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980) (citation omitted). *Accord Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983); M. Derfner & A. Wolf, 1 Court Awarded Attorney Fees § 4.02[1] at 4-12, 4-14 (1988).

Thus, the courts have explained that "[a] claim is colorable, for the purpose of the bad faith exception, when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim." *Nemeroff v. Abelson*, 620 F.2d at 348 (footnote omitted). Observing these strictures makes it doubtful whether a finding of bad faith may be made "without some proof of malice entirely apart from inferences arising from the possibly frivolous character of a particular claim." *Copeland v. Martinez*, 603 F.2d 981, 991 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980).

There is compelling reason why "bad faith" requires proof of malice or vexatious purpose on the part of a party. The underlying rationale for the American Rule exception is punitive, not compensatory. *Hall v. Cole*, 412 U.S. at 5. Thus, the finding of "bad faith" is necessarily subjective; the sanctions must be personal to the party because they are intended to punish and therefore should not rest on the collected wisdom of what is reasonable conduct in litigation.

There are other important reasons for preserving the "sensible distinction" (*Copeland v. Martinez*, 603 F.2d at 991), between Rule 11 sanctions and sanctions under the courts' inherent powers. As this Court explained in *Chambers v. NASCO, Inc.*, the courts' inherent powers may be used "to fill in the interstices" left by the statutory scheme. The "narrow exceptions" to the American Rule reach "to cases in which a litigant has engaged in bad faith conduct or willful disobedience of a court's orders" -- in contrast to attorneys' fees under Rule 11 which sanctions conduct "which merely fails to meet a reasonableness standard." *Chambers*, 111 S.Ct. at 2134.

2. The district court here plainly erred in this regard. The court concluded that sanctions against Mrs. Sakaria were warranted "under the bad faith exception" because "[Mrs. Sakaria] and her counsel, Mr. Huffman,

continued this litigation without the requisite factual and legal basis and well beyond that point where *an objectively reasonable person would have dismissed the case.*" App. 9a (emphasis added). The court cited no authority for the proposition that Mrs. Sakaria could be sanctioned for bad faith under the objective standard.

The district court's order "adopted in full" the magistrate's *Report and Recommendation*. App. 8a. The magistrate found that "Mr. Huffman and Mrs. Sakaria continued this litigation well past the point of objective reasonableness." App. 22a. From that finding the magistrate made clear that she was sanctioning Mr. Huffman under the authority of Rule 11. The magistrate made equally clear that she believed that Mrs. Sakaria's conduct, viewed objectively, "warrant[ed] a sanction under the bad faith exception." App. 22a. It is thus indisputable that the magistrate intended to do precisely what she stated she was doing -- sanction Mrs. Sakaria under the wrong standard.[4]

3. The consequences of the court's actions should not be understated. Since the courts' inherent powers are "both broader and narrower than other means of imposing sanctions" (*Chambers*, 111 S.Ct. at 2134), by collapsing the standards for sanctioning conduct under Rule 11 and the American Rule exceptions, the court has effectively lowered the constraints for invoking the courts' inherent powers. Under the lower court's view, it may sanction a party such as Mrs. Sakaria when

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4 We recognize that a court may invoke its inherent powers even if the conduct could also be sanctioned under Rule 11. *See Chambers*, 111 S.Ct. at 2135. But this is not a case of alternative sanctions. Rather, the lower court adopted uncritically this Court's recent ruling in *Business Guides* and applied it across the board to the insurance companies' claims for sanctions against Mrs. Sakaria and her attorney under Rule 11, 28 U.S.C. § 1927, and the court's inherent power. The court simply collapsed the question of sanctions available under the statutory scheme and its inherent powers into a single inquiry -- the objective reasonableness of the conduct of Mrs. Sakaria and her attorney.

it appears to the court that the lawsuit will not be successful, even where, as in this case, Mrs. Sakaria had to rely on counsel for advice as to what evidentiary tools were available, what constituted admissible evidence, what quantum of evidence was required to survive a motion for summary judgment, and when a party should voluntarily dismiss her claims. Moreover, by collapsing Rule 11 and the bad faith exception, the district court enlarged its own powers and diminished congressional authority over this area.

Adoption of an "objective reasonableness" standard for the bad faith exception to the American Rule would pose an additional problem: Precisely what is the "objective" standard which should apply to parties engaged in complex and lengthy litigation of this kind? Certainly it cannot be the same standard of knowledge and competence with which their attorneys are charged. *See Business Guides*, 111 S.Ct. at 933. Presumably the test would vary depending upon the offending plaintiff. A plaintiff who is a naturalized citizen unfamiliar with the American legal system would be subjected to one standard, while a plaintiff who is a sophisticated businessman and frequent litigant would be held to another standard. The complexity of the litigation in question, the particular branch of law involved and other variables also would affect the overall determination of reasonableness.

Nor can an "objective reasonableness" standard applied to the American Rule be applied in the same manner as Rule 11. Rule 11 imposes an additional requirement that to be sanctioned, a party must have actually signed the particular pleading in question. *See Business Guides*, 111 S.Ct. at 933. The act of signing should at least alert a party to the potential for sanctions under Rule 11. By contrast, here Mrs. Sakaria was sanctioned generally under the court's inherent powers for "her continuation" of the suit. Mrs. Sakaria had no way of knowing in advance -- and, obviously, could not rely on counsel for this advice -- when it would

cease to be objectively reasonable for her to continue to maintain her suit.

4. Finally, members of the Court have previously warned of the uncertainty in the lower courts concerning their inherent powers and have called for additional guidance from this Court. In *Chambers*, Justice Kennedy observed that the "only limitation on this sanctioning authority appears to be a finding at some point of 'bad faith,' a standard the Court fails to define," and suggested that the "bad faith standard, at least without adequate definition, thwarts the first requirement of due process, namely, that '[a]ll are entitled to be informed as to what the State commands or forbids.'" *Chambers*, 111 S.Ct. at 2142, 2145 (Kennedy, J., dissenting) (citation omitted). Similarly, in *Business Guides*, Justice Kennedy questioned whether even under Rule 11 "it [would be] an abuse of discretion to sanction a represented party if the party has acted in good faith. . . . [A]n objective standard does, and should, govern the conduct of the attorney. With respect to a represented party, though, I would reverse the decision below for having applied a standard of objective reasonableness rather than some subjective bad faith standard." *Business Guides*, 111 S.Ct. at 943 (Kennedy, J., dissenting).

This concern over the lack of apparent standards has also been voiced by the commentators:

> While the federal courts agree on a vague definition of conduct which warrants an assessment of bad faith fees, the application of that definition to the circumstances of particular cases yields as many different results as there are cases and judges. Because of the wide discretion of trial courts in passing on requests for bad faith fees, a lack of clear direction from the Supreme Court, and the great variety of circumstances which give rise to petitions for bad faith fees in a broad range of federal cases, the case law is far from consistent

> on the question of what the definition actually means.

M. Derfner & A. Wolf, 1 Court Awarded Attorney Fees § 4.02[1] at 4-10 (1988). This case presents a proper vehicle for the Court to proffer standards to guide the federal courts in the appropriate exercise of their inherent authority.

B. Even If the Bad Faith Exception Rested On An Objective Standard, the District Court Misapplied That Standard In This Case.

1. Assuming arguendo that the objective standard were to apply under the American Rule, the lower court improperly rendered it in this case. The error is attributable to a lack of standards generally in this important area of procedural law. Action by this Court is required to provide guidance not only to the lower courts but to attorneys and litigants as well.

The district court concluded that sanctions against Mr. Huffman were warranted because he "failed to pursue discovery," "failed to attempt to develop admissible evidence," and "failed to advise plaintiff to dismiss the case in light of a lack of admissible evidence." App. 8a. The court then imposed sanctions against Mrs. Sakaria for "her continuation of this warrantless suit." *Id.* While the court included an additional ground for sanctioning Mrs. Sakaria -- that she had allegedly made misleading statements during discovery -- it is plain from the text of the district court's analysis that the principal predicate for her penalty was continued prosecution of a supposedly warrantless suit: "These facts and the full record of this case lead to the conclusion that plaintiff and her counsel, Mr. Huffman, continued this litigation . . . well beyond the point where an objectively reasonable person would have dismissed the case." App. 9a.

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As a matter of law and logic, it is surely not appropriate to sanction a represented party for failure to dismiss a

lawsuit when the party's attorney is sanctioned for the same reason. Under such a practice, the court would be punishing a party for not making a unilateral judgment to terminate a lawsuit which her attorney should have advised her to terminate had he properly exercised his professional judgment.

2. This suit presents a good case in point. The court sanctioned Mr. Huffman for, *inter alia*, failing to develop admissible evidence and failing to dismiss the action for want of admissible evidence. The dismissal of this suit was not had for want of prosecution but for want of evidence presented in the proper form to defeat a motion for summary judgment. Judgments about the admissibility of evidence, or whether there is sufficient evidence to survive a Rule 56 motion, are legal judgments for which a party not schooled in the Federal Rules of Evidence and the Federal Rules of Civil Procedure must rely on counsel. If counsel, in light of the Federal Rules of Evidence, the Federal Rules of Civil Procedure and the Court's pronouncements in this area,[5] has

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5 *E.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A recent commentary summarizes the standards for a defendant moving for summary judgment:

> The defendant does not have the burden of proof at trial unless the issue in question is a matter of affirmative defense. A party moving for summary judgment who does not have the burden of proof can prevail on either of two bases. One is by offering evidence in support of the motion that negates an issue as to which the nonmoving party has the burden of proof. . . . The other basis on which a party not having the burden of proof can prevail in summary judgment is by showing that the nonmoving party will be unable to prove a critical fact at trial. Here, the moving party is not offering evidence to negate the issue of fact; rather, the moving party seeks to demonstrate that there is no evidence by which such an issue can be presented at trial.

F. James, G. Hazard, & J. Leubsdorf, *Civil Procedure* § 4.14 at 215 (4th ed. 1992). It is incomprehensible that a nonlawyer such as Mrs. Sakaria could be sanctioned under an objective standard for failing to dismiss her action rather than suffer entry of summary judgment.

"failed to advise plaintiff to dismiss the case," then the plaintiff can hardly be faulted -- much less *sanctioned* -- for continuing her suit to some kind of judgment. Mrs. Sakaria should not have to pay respondents' attorneys' fees for failing to second-guess her counsel, opposing counsel and the district court as to the extent to which the circumstances surrounding her husband's death involved evidence admissible and necessary to survive respondents' motion for summary judgment.

Indeed, such an approach, if universalized, would have serious consequences. An individual's right to seek redress for grievances is too important to erect barriers which will chill her assertion of potentially valid claims for fear of misjudging the quality of the lawsuit at a future juncture. Certainly it is proper to sanction anyone who knowingly misuses the litigation process. But to sanction a party who believes -- even erroneously -- that what he or she has said to the court is true, *see* Affidavit of Elpis Sakaria, App. at 15b, compromises the distinction between a legitimate concern for litigation abuse and the illegitimate deterrence of potentially valid claims. This Court's guidance is required to clarify the boundaries of this crucial demarcation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jay S. Bybee
6516 Millstone Drive
Baton Rouge, LA 70808
(504) 388-8701

Ronald D. Maines
(Counsel of Record)
Maines & Harshman, Chrtd.
Suite 900
2300 M Street, N.W.
Washington, DC 20037
(202) 223-2817

Attorneys for Petitioner,
Elpis Sakaria

September 16, 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

May 19, 1992

No. 91-1221
CA-87-3302-HM

ELPIS SAKARIA

Plaintiff - Appellant

v.

ALLSTATE LIFE INSURANCE COMPANY;
MINNESOTA MUTUAL LIFE INSURANCE COMPANY;
AMEX LIFE ASSURANCE COMPANY

Defendants - Appellees

No. 91-1213
CA-87-3302-HM

In Re: WILLIAM F. HUFFMAN

Appellant

ELPIS SAKARIA

Plaintiff

v.

ALLSTATE LIFE INSURANCE COMPANY;
MINNESOTA MUTUAL LIFE INSURANCE COMPANY;
AMEX LIFE ASSURANCE COMPANY

Defendants - Appellees

On Petition for Rehearing with
Suggestion for Rehearing In Banc

Appellants filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a

poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Luttig, with the concurrence of Judge Widener and Judge MacKenzie, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

For the Court,

/s/ Bert M. Montague

ACTING CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELPIS SAKARIA, Plaintiff-Appellant, v. ALLSTATE LIFE INSURANCE COMPANY; MINNESOTA MUTUAL LIFE INSURANCE COMPANY; AMEX LIFE ASSURANCE COMPANY, Defendants-Appellees.	)	No. 91-1211
IN RE: WILLIAM F. HUFFMAN, Appellant, ELPIS SAKARIA, Plaintiff, v. ALLSTATE LIFE INSURANCE COMPANY; MINNESOTA MUTUAL LIFE INSURANCE COMPANY; AMEX LIFE ASSURANCE COMPANY, Defendants-Appellees.	)	

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
Herbert F. Murray, Senior District Judge.
(CA-87-3302-HM)

Argued: March 2, 1992
Decided: April 20, 1992

Before WIDENER and LUTTIG, Circuit Judges, and
MACKENZIE, Senior United States District Judge
for the Eastern District of Virginia,
sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Albert David Brault, BRAULT, GRAHAM, SCOTT & BRAULT, Rockville, Maryland, for Appellant Huffman; Nicholas Hamner Cobbs, LAW OFFICES OF NICHOLAS H. COBBS, Washington, D.C., for Appellant Sakaria. Michael Esher Yaggy, PIPER & MARBURY, Baltimore, Maryland, for Appellees. **ON BRIEF:** Nicholas Gilman, GILMAN, OLSON & PANGIA, Washington, D.C., for Appellant Sakaria. Michael S. Barranco, Diane M. Lank, PIPER & MARBURY, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Mrs. Elpis Sakaria and her attorney Mr. William F. Huffman appeal from a judgment of the United States District Court for the District of Maryland awarding sanctions to the defendant insurance companies. Our review of the record discloses that this appeal is without merit. Accordingly, we affirm for the reasons stated in the opinions of the district court and the magistrate judge. *See* J.A. at 11, 15.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ELPIS SAKARIA :

v. : CIVIL NO. HM-87-3302

ALLSTATE LIFE :
INSURANCE CO., et al.

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ORDER

The Court has considered Magistrate Judge Blake's Report and Recommendation dated May 8, 1991 in the above-captioned case and, for the reasons set forth in the attached Memorandum, adopts in full the findings and conclusions of the Magistrate Judge. Accordingly, it is this 9th day of September, 1991, by the United States District Court for the District of Maryland,
ORDERED:

(1) that the Report and Recommendation of the Magistrate Judge be, and the same hereby is, *Affirmed and Adopted*;

(2) that defendants' Motion for Sanctions be, and the same hereby is, *Granted in part and denied in part*:

(3) that sanctions in the amount of four thousand dollars ($4,000.00) be awarded against Elpis Sakaria;

(4) that sanctions in the amount of four thousand dollars ($4,000.00) be awarded against William F. Huffman, Esq.;

(5) that no sanctions be awarded against Albert D. Brault, Esq. and M. Kathleen Parker, Esq.; and

(6) that the Clerk of the Court shall mail a copy of this Order and accompanying Memorandum to the parties, to all counsel, and to Magistrate Judge Blake.

/s/ Herbert F. Murray
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ELPIS SAKARIA	:	
V.	:	CIVIL NO. HM-87-3302
ALLSTATE LIFE INSURANCE CO., et al.	:	

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MEMORANDUM

United States Magistrate Judge Catherine C. Blake issued a Report and Recommendation, dated May 8, 1991, which addressed a motion for Rule 11 sanctions made by defendants in the above-captioned case against the plaintiff personally, against her original counsel Albert D. Brault and M. Kathleen Parker of Brault, Graham, Scott and Brault, and against subsequent counsel William F. Huffman. Magistrate Judge Blake found that sanctions against both Mrs. Sakaria and Mr. Huffman were appropriate and recommended that they be fined four thousand dollars each; the Magistrate Judge did not recommend the imposition of sanctions against Mr. Brault and Ms. Parker. Mrs. Sakaria and Mr. Huffman filed objections to the Magistrate Judge's Report and Recommendation on June 27, 1991 and defendants filed responses thereto on July 15, 1991. Replies were filed by Mrs. Sakaria and Mr. Huffman on July 30, 1991 and July 29, 1991 respectively. The Court has conducted a *de novo* review of the record in this case and is now prepared to rule.

Plaintiff Elpis Sakaria filed suit on December 9, 1987 against defendants Allstate Life Insurance Company, American Express Travel Related Services and Minnesota Mutual Life Insurance Company in an attempt to collect over one million dollars in accidental death benefits after her husband, Jagdish "Jack" Sakaria, experienced a fatal heart attack in Greece while visiting relatives. Plaintiff and her attorneys characterized

decedent's death as accidental by alleging that the stress of landing in the Rome airport just thirty minutes after a terrorist attack caused decedent to suffer a heart attack some forty hours later, well after his safe arrive in Greece. Plaintiff relied almost exclusively on the unsworn affidavits of Nick Bafitis, a family friend who met Mr. Sakaria at the Athens airport, to establish that Mr. Sakaria had been detained on the airplane under suffocating conditions, had witnessed the bloody aftermath of the terrorist attack and had arrived in Greece severely shaken and in the initial stages of the coronary event that eventually led to his death on December 29, 1985. Mr. Bafitis's information was based solely on statements of the decedent, who had been known to suffer paranoid delusions and fear as a result of head injuries sustained in a 1978 pedestrian-vehicle accident.

On February 12, 1990, this Court adopted Magistrate Blake's Report and Recommendation and granted summary judgment in favor of defendants primarily because plaintiff had failed to advance sufficient evidence showing a causal nexus between the events at the Rome airport and her husband's death. Subsequently, defendants moved for Rule 11 sanctions based on plaintiff's and plaintiff's counsel's "unjustifiable filing and prosecution" of the case at bar. (Defendants' Motion for Sanctions at 1). At that point, defendants had spent over $100,000 in attorneys' fees defending Mrs. Sakaria's suit.

This Court will adopt in full Magistrate Judge Blake's Report and Recommendation with respect to the issue of Rule 11 sanctions for the reasons stated therein. Objections filed by plaintiff and by Mr. Huffman do not controvert, or even address, the very sound grounds for imposing sanctions against Mr. Huffman and Mrs. Sakaria. Sanctions are warranted against Mr. Huffman because he failed to pursue discovery or obtain a stay of the proceedings until new counsel could be obtained; failed to attempt to develop admissible evidence; and failed to advise plaintiff to dismiss the case in light of a lack of admissible evidence. Sanctions are warranted against Mrs. Sakaria under the bad faith exception because of her mislead-

ing statements during discovery and her continuation of this warrantless suit.

These facts and the full record of this case lead to the conclusion that plaintiff and her counsel, Mr. Huffman, continued this litigation without the requisite factual and legal basis and well beyond that point where an objectively reasonable person would have dismissed the case. The Court also concurs with the Magistrate Judge that sanctions should not be assessed against Albert D. Brault, Esq. and M. Kathleen Parker, Esq.

Accordingly, this Court will adopt the Magistrate Judge's Report and Recommendation by separate Order.

/s/ Herbert F. Murray
Senior United States District Judge

Dated: September 9, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ELPIS SAKARIA	:	
	:	
v.	:	CIVIL NO. HM-87-3302
	:	
ALLSTATE LIFE INSURANCE CO., et al.	:	
	:	

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REPORT AND RECOMMENDATION

The Plaintiff in this case, Elpis Sakaria, filed suit against defendants American Express Travel Related Services, Minnesota Mutual Life Insurance Company, and Allstate Life Insurance Company (collectively, "the defendants"), seeking to recover money allegedly due for the death of her husband on December 29, 1985, under accidental death policies issued by the companies. By order dated February 12, 1990, Judge Herbert F. Murray granted summary judgment to the companies, affirming my report and recommendation of January 10, 1990.[1]

Now pending is the defendants' motion for sanctions under Fed. R. Civ. P. 11, 28 U.S.C. § 1927, Md. Rule 1-341, and the inherent power of the court.[2] A hearing was held November 5, 1990, and full briefing has been completed. For the reasons that follow, I will recommend that the defendants' motion be granted in part and denied in part.

No sanctions will be recommended against the lawyers who initially represented Mrs. Sakaria in filing this case, Albert

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1 No objections were filed to the report and recommendation.

2 This motion was referred to me by Judge Murray pursuant to 28 U.S.C. § 636 and Local Rule 301.

D. Brault and M. Kathleen Parker; sanctions in the amount of $4,000.00 will be recommended against successor counsel William F. Huffman; and sanctions in the amount of $4,000.00 will be recommended against Mrs. Sakaria personally.[3]

The facts surrounding Mr. Sakaria's death, as established by the summary judgment record, are set forth in my report and recommendation and will not be repeated here.[4] Apparently, Mrs. Sakaria first discussed the possibility of a claim under the defendants' accidental death policies with Mr. Huffman. He brought her to the Brault firm to handle any possible litigation. Mr. Brault and an associate met with Mrs. Sakaria and Mr. Huffman on May 7, 1986; thereafter members of the Brault firm engaged in both factual and legal pre-filing inquiry as detailed in their memorandum in opposition to the defendants' motion. Unsuccessful attempts also were made to obtain certain information from TWA. (Opposition to Motion for Sanctions, Exhibits 21-24).

Suit was filed on December 9, 1987, alleging that Mr. Sakaria's death on December 29, 1985 of an acute myocardial infarction was a direct result of the "psychological trauma" he suffered in the course of his travel from Washington, D.C. to Athens by way of the Rome airport on December 27, 1985. (Complaint at ¶ 20). The complaint asserted that, while the passengers on flight 840 were being taken to another plane at the Rome airport, shortly after a terrorist attack, "the aftermath of the bloody attack was visible to all the passengers." *Id.* at ¶ 12.

Answers were filed on March 9, 1988, and on June 16, 1988 the defendants served discovery requests on the plaintiff.

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3 Mrs. Sakaria has been represented in connection with the motion for sanctions by Joseph H. Koonz, Jr. No sanctions were requested as to Mr. Koonz and none are warranted.

4 The report and recommendation of January 10, 1990 is incorporated herein by reference.

Apparently Mr. Brault and Ms. Parker, the associate then assigned to the case, encountered substantial difficulties in obtaining answers to those requests from their client. The defendants attached as an exhibit to their motion for sanctions a memorandum of a telephone conversation on October 24, 1988 between Ms. Parker and a legal assistant for defense counsel in which Ms. Parker reportedly stated that her client was taking the position that the information requested was irrelevant. (Defendants' Motion for Sanctions, Exhibit 6). On December 8, 1988, Mr. Brault and Ms. Parker were permitted to withdraw their appearance on the grounds of irreconcilable differences with their client. At this point, the defendants apparently had expended only some $8,300 in attorneys' fees. (November 5, 1990 Hearing Transcript at 45; Defendants' Motion for Sanctions, attachment).

Mr. Huffman entered his appearance for Mrs. Sakaria on January 18, 1989. As he explained the circumstances in his opposition to the motion for sanctions:

> When plaintiff's original counsel, Brault, Graham, Scott and Brault, withdrew their appearance as her counsel due to her lack of cooperation, Plaintiff asked William F. Huffman as her private counsel to represent her until other counsel could be obtained. William F. Huffman then procured another law firm to review all of her records handed over from the original law firm, but that second law firm declined to become involved in the case.
>
> As a sole practitioner without staff or facilities needed for handling the case, William Huffman continued his representation with the expectation that other counsel would be forthcoming, but it was not until January, 1990 that Plaintiff was able to procure the services of Joseph H. Koonz, Jr., Esquire, as her new counsel, and former counsel William F. Huffman at that time turned over to her new counsel

> all of the records including those made available from her original counsel.

(Memorandum in Support of Plaintiff's Opposition to Defendant's Motion for Sanctions at 1; *see also* Hearing Tr. at 104).

On November 14, 1988, the same day Mr. Brault's firm moved to withdraw its appearance, Mrs. Sakaria and Mr. Huffman signed answers to interrogatories and served them on the defendants.[5] Answer No. 13 to the interrogatories propounded by Minnesota Mutual identified the events causing "psychological trauma" to Mr. Sakaria as:

> (a) The unexpected stopover at Rome, despite assurances by the airline that there would be no stops.
>
> (b) The long wait on board the plane while standing on the airfield in Rome.
>
> (c) The walk through the terminal and witnessing the aftermath of the bloody incident.
>
> (d) The remainder of the trip to Athens.

(Defendants' Motion for Summary Judgment, Exhibit 3). Further, in answer No. 7 to Allstate's interrogatories and answer No. 2 to Minnesota's interrogatories, Mrs. Sakaria claimed that when her husband departed from the United States he was "in excellent physical and mental health. . ." (*Id.*, Exhibits 1 and 3).[6]

Defendants' counsel, by letter dated December 1, 1988, stated to Mr. Huffman that the answers to interrogatories

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5 Only notices of service were filed with the court, pursuant to Local Rule.

6 Mrs. Sakaria did disclose the fact of a head injury in response to another interrogatory. (*Id.*, Exhibit 1).

contained no indication of admissible evidence to support the claim and pointed out that some months had passed during which discovery could have been undertaken by the plaintiff in an attempt to develop such evidence. He requested dismissal of the case before the defendants had to engage in expensive discovery to support a motion for summary judgment, and announced his intention to seek sanctions if the case were not dismissed. (Defendants' Motion for Sanctions, Exhibit 7).[7]

Mr. Huffman and Mrs. Sakaria did not dismiss the case. On December 12, 1988, Mr. Huffman wrote a letter to Dr. H. Brandis Marsh, a cardiologist, seeking an opinion as to the cause of death. Without having any corroborating evidence beyond what was initially provided by his client before suit was filed, Mr. Huffman asserted to Dr. Marsh that the plane carrying Mr. Sakaria stopped in Rome "just during or after the bloody terrorist attack," that Mr. Sakaria was kept on the plane for one and a half hours without fresh air, and that Mr. Sakaria "saw bodies and blood" while walking through the terminals to the connecting plane. (Defendants' Motion for Summary Judgment, Exhibit 19, Attachment).[8] Confinement on the plane without ventilation and witnessing the aftermath of the attack were key factors in Dr. Marsh's opinion, expressed by letter dated December 23, 1988, that Mr. Sakaria died "as a result of a rhythm disorder caused by a myocardial infarction provoked by the circumstances of travel." (*Id.*, Exhibit 15).

The defendants took Dr. Marsh's deposition on June 16, 1989. Dr. Marsh testified that he had no independent information, other than statements made by Mr. Huffman, that Mr. Sakaria spent one and one-half hours in a closed plane with no electrical supply, or that Mr. Sakaria personally witnessed

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7 While there is a fine line to observe between an unreasonable threat of sanctions and a justified warning, in this case the warning was appropriate.

8 Mr. Huffman also stated that Mr. Sakaria was "in excellent health" without researching the mental difficulties remaining from an earlier head injury. (*Id.*).

"rather graphic evidence of the carnage caused by the bombing." (Defendants' Motion for Summary Judgment, Exhibit 19, Depos. Tr. at 11-12). Dr. Marsh stated that his opinion would be "a little bit less certain" if he learned that more than 40 hours, rather than 24, elapsed from the time Mr. Sakaria arrived in Greece until the time of his death. (*Id.* at 14). He also indicated that his opinion would be affected if Mr. Sakaria saw nothing of the carnage, if the air conditioning were on in the plane, and if the passengers were calm during the hour and a half wait on the runway. (*Id.* at 15-16, 17, 26). Dr. Marsh was asked, in summary:

> Q: Let me suggest this scenario to you. He's on an airplane 30 minutes away from the airport when the shooting is all over. He has another 30 minutes of flying, if you will, to get to the airport. He sits in a plane for an hour or an hour and a half. He never sees the carnage. He never sees any bodies. He never sees any blood. He's not even taken through the area where the incident occurred. He hears no shooting. He hears no grenades -- no nothing. He's then put on another plane and goes to Athens. Does that affect any -- And let's assume that scenario is correct. Does that affect any of the opinions that you have given in your letter?
>
> A: Again, let me add one additional presumption, which I think is in the spirit of your question; and that is that that hour and a half on the runway is not one characterized by a heat stifling environment et cetera, et cetera.
>
> Q: Yes. Let's assume that's true. And let's add that the mood on the plane was quiet and calm.
>
> A: Yes. That hypothetical would clearly lead me to a a [sic] very different opinion.

Q: And to an opinion sufficiently different that you would no longer subscribe to the opinion in your letter of December 23, 1988?

A: I think that's a fair statement. Yes. Now, to be sure that answer is clear: I would not subscribe to the opinion expressed in that letter.

(*Id.* at 43-44).

Attempting to resurrect Dr. Marsh's opinion on cross-examination, Mr. Huffman relied on the idea of the stopover in Rome being "unplanned, at least from [Mr. Sakaria's] standpoint," and a general assumption that, if there were no trauma occurring after Mr. Sakaria arrived in Greece, some trauma must have occurred during travel. (*Id.* at 53).

Despite offers from defense counsel to share portions of their investigative file, "which contains evidence that Mr. Sakaria could not have seen, heard or in any other way witnessed the actual terrorist attack in the Rome airport or its aftermath" (Defendants' Motion for Sanctions, Exhibit 8), Mr. Huffman neither accepted that offer nor undertook any discovery of his own to determine the true circumstances of Mr. Sakaria's travel. The defendants, therefore, undertook to depose sufficient witnesses to support their motion for summary judgment, including several passengers, the plane's captain, and the doctor familiar with Mr. Sakaria's mental condition. Mr. Huffman participated in those depositions, usually by telephone. The testimony of the witnesses did not support the scenario he had described to Dr. Marsh or the answer to Interrogatory No. 13. (See Defendants' Motion for Summary Judgment, Exhibits 13, 14, 16-18).

On October 16, 1989, the defendants filed a thorough, well-supported motion for summary judgment with copies of the sworn testimony and other exhibits supporting their factual and legal arguments. On November 6, 1989, Mr. Huffman signed and filed an opposition to that motion in which he

relied on the fact that the Sakarias did not know the plane was scheduled to stop in Rome, criticized the defendants for only presenting testimony from three or four of the passengers, asserted that psychologists and cabin environment specialists would be necessary to evaluate the atmosphere on the plane, and claimed that corrected information would be forthcoming from Mr. Bafitis, the witness who met Mr. Sakaria at the airport. At no point did he explain how a scheduled stop in Rome, even if unknown to the Sakarias, can be considered an "accident;" at no point did he offer any form of admissible evidence to support the revised claim that:

> [a]lthough Sakaria did not 'walk through the terminal and witness the aftermath of the bloody incident,' he did see it when he was permitted to go upstairs to the men's toilet facilities by the security personnel;

(Memorandum in Support of Opposition to Summary Judgment at 9) and at no point did he offer any case law to support the argument that the circumstances Mr. Sakaria was exposed to constituted an "accident" or "accidental injury" which caused a loss due "directly and independently of all other causes" to that injury. (See Defendants' Motion for Summary Judgment, Exhibits 4-9). As pointed out by defendants in their reply, he failed to meet well-settled standards requiring the party bearing the burden of proof to come forward with sufficient evidence to support a verdict in that party's favor. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Fed. R. Civ. P. 11 requires imposition of sanctions upon attorneys or their clients who file pleadings not reasonably grounded in fact or law. Under Rule 11:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded

> in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose....

The standard for determining whether a Rule 11 violation has occurred is objective, requiring the court to decide whether a reasonable attorney or party in like circumstances would believe his or her position to be factually and legally justified. *Business Guides Inc. v. Chromatic Communications Enterprises, Inc.*, ____ U.S. ____, 111 S.Ct. 922, 928 (1991)[9]; *Artco Corp. v. Lynnhaven Dry Storage Marina, Inc.*, 898 F.2d 953, 956 (4th Cir. 1990); *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987).

Rule 11 requires an attorney to make a reasonable pre-filing inquiry into both the factual and legal basis of a complaint before suit is filed. *In re Kunstler*, 914 F.2d 505, 514 (4th Cir. 1990), *cert. denied* 111 S.Ct. 1607 (1991). What is objectively reasonable at the initial stage of a case, however, may no longer be reasonable after sufficient time for discovery has passed without providing evidence to substantiate the results of the preliminary inquiry. The Fourth Circuit recently has noted, in a Title VII case, that sanctions are more appropriately assessed "for the prolonged maintenance of a frivolous suit" than for the filing of a complaint where there was initially a reasonable belief that a *prima facie* case existed. *Blue v. U.S. Dept. of Army*, 914 F.2d 525, 537 (4th Cir. 1990), *cert. denied* 111 S.Ct. 1580 (1991). In a case analogous to the present circumstances, the Fourth Circuit upheld an award of fees under Rule 11 against attorneys who filed a response to a summary judgment motion despite deposition testimony of three key witnesses repudiating prior statements that "arguably" had given rise to an inference of fraud. *Fahrenz v. Meadow Farm Partnership*, 850 F.2d 207, 210 (4th Cir. 1988).

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9 What is objectively reasonable for a client may differ from what is objectively reasonable for an attorney, depending on the issue involved. *Id.* at 933.

By adopting an objective standard, Rule 11 reaches beyond intentional misconduct or bad faith. "Inexperience, incompetence, willfulness or deliberate choice may all contribute to a violation." *Cabell v. Petty, supra*, 810 F.2d at 466, *citing Schwarzer*, Sanctions under the New Federal Rule 11, A Closer Look, 104 F.R.D. 181, 201 (1985). If a violation has occurred, some sanction is required. *Artco Corp. v. Lynnhaven, supra*, 898 F.2d at 956; *Cabell v. Petty, supra*, 810 F.2d at 466.

Rule 11 provides that, if a "paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction...." This language implies that a client, as well as the attorney representing him who actually signs the paper, may be sanctioned for pleadings that are not reasonably grounded in law or fact. See, e.g., *Artco Corp. v. Lynnhaven, supra*; *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1474-75 (2nd Cir. 1988), *reversed in part and remanded sub nom, Payelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989). The Supreme Court, however, has not yet ruled on this issue. See *Business Guides Inc., supra*, 111 S.Ct. 15 935;[10] *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ____, 110 S.Ct. 2447, 2452 n.1 (1990). Imposition of sanctions on represented parties for papers signed by their attorneys raises difficult questions of assessing fault, particularly in light of the attorney-client privilege. *Eastway Const. Corp. v. City of New York*, 637 F.Supp. 558, 569-70 (E.D.N.Y. 1986), *modified*, 821 F.2d 121 (1987), *cert. denied* 484 U.S. 918 (1987).

Parties may be sanctioned, however, for papers they personally sign in violation of Rule 11. *Business Guides Inc., supra*. Parties as well as attorneys also may be sanctioned under the "bad faith" exception to the American Rule, permitting a court to award attorneys' fees against a losing party or attorney who has "'acted in bad faith, vexatiously, wantonly, or

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10 In *Business Guides*, the Court stated "We have no occasion to determine whether or under what circumstances a nonsigning party may be sanctioned." *Id.*

for oppressive reasons'". *Blue v. U.S. Dept. of Army, supra*, 914 F.2d at 533, quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975). A finding of bad faith under the "bad faith" exception (or under 28 U.S.C. § 1927 as to attorneys) may be made, on an objective basis, where a litigant or his counsel acts "in reckless or callous disregard for the law" or acts "consciously and deliberately in the teeth of what they know to be the law." *Harris v. Marsh*, 679 F.Supp. 1204, 1376 (E.D.N.C. 1987), *vacated in part on reconsideration*, 123 F.R.D. 204 (E.D.N.C. 1988), *aff'd in part, rev'd in part, Blue v. U.S. Dept. of Army, supra; citing In re: TCI Ltd.*, 769 F.2d 441, 442 (7th Cir. 1985). Bad faith is present "when a party initiates an action unfounded at its inception or recklessly maintains an action long after it becomes clear that the claims at issue are no longer colorable." *Harris v. Marsh, supra*, 679 F.Supp. at 1377. See also *Nemeroff v. Abelson*, 704 F.2d 652, 659-60 (2d Cir. 1983) (awarding fees under the bad faith exception where the plaintiff and his attorneys continued the suit for several months past the point in discovery where they should have realized they had no support for their claims).

Finding that a Rule 11 violation has occurred mandates the imposition of sanctions. *Cabell v. Petty, supra*, 810 F.2d at 466. Several factors, however, are to be considered in determining the amount of any monetary sanction. These include:

1. the reasonableness of the opposing parties' attorney's fees;

2. the minimum needed to deter future litigation abuse;

3. the ability of the offending party or counsel to pay the sanction; and

4. factors related to the severity of the Rule 11 violation.

These additional factors include whether the offending party or counsel acted in bad faith; the risk of chilling future meritorious litigation; and other equitable considerations such as the relative experience of the offending party or counsel. *In re Kunstler, supra*, 914 F.2d at 523-25 (vacating the sanction of over $100,000 to permit consideration of these factors).

The Fourth Circuit repeatedly has emphasized that the district court should impose "the least severe sanction adequate to accomplish the purpose of Rule 11." *In re Kunstler, supra*, 914 F.2d at 523; *Cabell v. Petty, supra*, 810 F.2d at 467-68. The Supreme Court recently stated that "'Rule 11 is not a fee-shifting statute'", *Business Guides v. Chromatic Communications Enterprises, supra*, 111 S.Ct. at 934, quoting *Cooter & Gell v. Hartmarx, supra*, 110 S.Ct. at 2462. While compensation of a Rule 11 victim is an appropriate consideration, the primary purpose of the Rule is to deter future litigation abuse. *In re Kunstler, supra*, 914 F.2d at 522. A reasonable sanction does not necessarily mean actual expenses and attorney's fees. *Id.* at 547, quoting *Fahrenz v. Meadow Farm Partnership, supra*, 850 F.2d at 211.

Similarly, the underlying purpose of the bad faith exception is to impose punitive, rather than compensatory, sanctions. *Hall v. Cole*, 412 U.S. 1, 5 (1973); *Nepera Chemical, Inc. v. Sea-Land Service, Inc.*, 794 F.2d 688, 702 (D.C. Cir. 1986). A district court should consider "equitable" factors in determining the amount of any bad faith sanction. *Blue v. U.S. Dept. of Army, supra*, 914 F.2d at 546.

Applying the legal principles set forth above to the circumstances of this case, it is evident to the court that sanctions against Mr. Brault and Ms. Parker are not appropriate. The pre-filing inquiry undertaken by the Brault firm, detailed in their opposition to the motion for sanctions, did not stop with an interview of Mrs. Sakaria. *Inter alia*, witnesses from Greece who saw and spoke with Mr. Sakaria upon his arrival in Athens were interviewed, the law was researched, the doctor who conducted the autopsy in Greece was contacted, and

attempts were made to obtain information from TWA before suit was filed. While the defendants are correct that an extensive pre-filing investigation does not in itself excuse the filing of an objectively unreasonable complaint, there was evidence that Mr. Sakaria might have suffered sufficient injury from unexpected exposure to the stressful aftermath of a terrorist attack to cause his death.[11] Without knowing the precise factual course of Mr. Sakaria's stopover in Rome, the application of Maryland law to his case did not clearly rule out a recovery for accidental death.[12]

It is equally evident to the court, however, that Mr. Huffman and Mrs. Sakaria continued this litigation well past the point of objective reasonableness. At the very least, the deposition testimony of Dr. Marsh should have prompted vigorous efforts by Mr. Huffman and Mrs. Sakaria to obtain support for the factual scenario presented to Dr. Marsh in Mr. Huffman's December 12, 1988 letter. See *Nemeroff v. Abelson, supra*, 704 F.2d at 660. Instead, however, they conducted no discovery at all.

As to Mr. Huffman, his signature on the opposition to the defendants' motion for summary judgment constituted a violation of Rule 11 requiring sanctions. He cannot excuse himself by subjective good faith or desire to help Mrs. Sakaria. Having entered his appearance and undertaken to provide representation, he is, unfortunately, responsible for the consequences.

As to Mrs. Sakaria, her conduct warrants a sanction under the bad faith exception. She signed answers to interroga-

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11 Had the facts been as they initially appeared to be, the opinion of Dr. Marsh might at least have created a jury question on causation.

12 See the discussion in the January 10, 1990 report and recommendation at pp. 7-10. It is also interesting to note that a terrorist attack may be an "accident" for purposes of the Warsaw Convention. *Buonocore v. TWA, Inc.*, 900 F.2d 8 (2d Cir. 1990); *Dav v. Trans World Airlines, Inc.*, 528 F.2d 31, 33 (2d Cir. 1975) *cert. denied*, 429 U.S. 890 (1976).

tories under the penalties of perjury that claimed her husband was in excellent physical and mental health and that he saw the aftermath of the terrorist attack in Rome. Particularly since she knew that the only evidence supporting the claim that Mr. Sakaria saw the "bloody aftermath" of the attack was Mr. Sakaria's statement to others in Athens, it was incumbent on her to disclose more accurate information concerning her husband's mental condition.

The deposition of Dr. Spiridon Koulouris, Mr. Sakaria's neurosurgeon, taken by defendants on October 4, 1989, indicates that Mr. Sakaria's condition was essentially unchanged from 1979 through December 1983. In 1979, Mrs. Sakaria reported that her husband occasionally seemed to have confabulations and to feel threatened by non-existent situations. In 1983, Dr. Koulouris reported that Mr. Sakaria continued to have "significant mental and behavorial changes" and his condition was one of "a total and permanent disability." (Defendants' Reply to Opposition to Motion for Summary Judgment, Exhibit 1). Whether this condition could have produced Mr. Sakaria's statements in Athens is a subject for expert testimony, but at the very least it should have been disclosed in the answers to interrogatories and to Dr. Marsh, the plaintiff's potential expert witness.[13]

Further, Mrs. Sakaria was well aware of the lack of factual support for her claim at the time the summary judgment motion was filed.[14] Her affidavit filed in June 1990

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13 Mrs. Sakaria later contradicted her own claim about Mr. Sakaria's excellent physical health by testifying at the November 5, 1990 hearing that she requested a non-stop flight from New York to Athens "because...of Mr. Sakaria's serious health problems,...a loss of bathroom control...." (Tr. at 117).

14 Telling evidence of this is provided by an excerpt of her deposition testimony taken in a related lawsuit against TWA, still pending in this court. As of October 16, 1989, after the discovery deadline had passed in this case and almost four years after the incident in Rome, she stated:

in connection with the sanctions motion, while perhaps not itself a basis for sanctions, evidences her unreasonable and intransigent attitude by continuing to insist that flight 840 was "nonstop" from New York to Athens, when the deposition testimony of the plane's captain and the published TWA schedule, which shows a change in planes, do not support her position. (See Opposition by the Plaintiff to Motion for Sanctions, attached Affidavit at 3-4; *cf.* Defendants' Motion for Summary Judgment, Ex. 12 and 14 at 26).[15] Mrs. Sakaria is an

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> Q. [By Mr. Rosenthal, Counsel for TWA]: My understanding is that you really don't know what happened in the Rome airport one way or another until you do further investigation?
>
> A. [By plaintiff Elpis Sakaria]: Yes, and I think that's a fair way, Mr. Rosenthal.
>
> . . .
>
> Q. Is it fair to say, as you sit here today, as you sit here right now, you don't really know whether your husband saw hand grenades?
>
> A. I have no -- I have not questioned -- I have not been given the opportunity by TWA to find out these facts.
>
> Q. Is it fair to say, as you sit here today, you don't really know whether your husband was exposed to any of the bloodshed and aftermath until you do further investigation?
>
> A. The only evidence of -- or whatever statement I have is Mr. Bafitis' statement and maybe if Mr. Huffman here is willing to ask all the other people that talked to my husband maybe we'll come up with other statements.

(Reply to Brault and Parker's Opposition to Motion for Sanctions, Exhibit 4 at 169-170.)

15 Similarly unsupported is Mrs. Sakaria's claim that "TWA basically forced the captain to fly his crew and passengers into a deadly terrorist attack." (Affidavit at 11).

educated and intelligent woman[16] with no excuse for her continued unreasonable attempts to maintain this lawsuit.

In determining an appropriate sanction, one of the factors for the court to consider is the person's ability to pay. Mr. Huffman submitted a letter concerning Mrs. Sakaria's financial condition in the course of discovery indicating a net income of $143,825.00 in 1985 and $167,262.00 in 1986. According to Mr. Huffman, Mrs. Sakaria also received life insurance benefits totalling $144,651.40. (Reply to Opposition to Elpis Sakaria, Ex. 2). At the hearing in November 1990, Mr. Koonz represented that Mrs. Sakaria "sold some property after her husband died," (Tr. at 73), which would be "verified by her return," (Tr. at 74) suggesting the figures provided by Mr. Huffman were not representative. Both Mr. Koonz, on behalf of Mrs. Sakaria, and Mr. Huffman personally, were given the opportunity to submit additional information after the hearing.

The information received from Mrs. Sakaria, consisting of partial tax returns, showed a limited adjusted gross income (from $18,254.00 in 1985 to $32,224 in 1988) primarily consisting, however, of taxable interest income and capital gains from undisclosed sources, offset by rental losses. (Letter from Mr. Koonz dated November 26, 1990, attachments).

Mr. Huffman submitted information under seal[17] stating his annual income and other expenses. He indicates some savings, a pension and limited law practice receipts. (Letter from Mr. Huffman dated November 17, 1990).

In light of my findings concerning the amount of the sanction needed to deter future litigation abuse and the finan-

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16 According to her Affidavit, she attained a B.S. in mathematics and physics from Fisk University, graduating magna cum laude and Phi Beta Kappa; thereafter she attained an MBA from Wayne State. (Affidavit at 1).

17 The defendants did not object to this procedure.

cial circumstances of the persons involved, extensive analysis of the reasonableness of the defendants' attorney's fees is not necessary. The defendants incurred approximately $32,600 of their total billing from November 6, 1989 when Mr. Huffman filed his opposition to their motion for summary judgment, until January 10, 1990 when my report and recommendation was issued. This work included a reply to Mrs. Sakaria's opposition, drafting of numerous motions *in limine*, preparation of a proposed pretrial order, and other activities necessitated by the approaching pretrial conference and trial date in late January 1990. Alternatively, the records show approximately $72,100 in fees after the June 1989 deposition of Dr. Marsh, including depositions and preparation of the motion for summary judgment as well as the other matters listed above.

The defendants have demonstrated that their overall rates were not excessively high, and that in most instances they did not double-staff proceedings such as depositions.[18] Further, all three insurance company defendants were primarily represented by the same attorneys at Piper & Marbury, rather than hiring separate counsel. A substantial amount of money, some one million fifty thousand dollars, would have been payable by the defendants had Mrs. Sakaria prevailed. (Hearing Tr. at 42-43). Because the amount of sanctions I find appropriate is well below what undisputably would be a "reasonable attorney's fee," a line-by-line examination of the specific billing charges would be pointless.[19]

In light of Mr. Huffman's financial circumstances, his years, and the fact that his law practice appears to be somewhat limited already, I find that a sanction in the amount of four thousand dollars ($4,000.00) will be sufficient to deter him

---

18 The presence of a second attorney representing the same parties at a deposition ordinarily would not be found "reasonable" for fee-shifting purposes.

19 In any future fee petition, it would be preferable for defense counsel to submit affidavits from other practitioners or published surveys indicating rates charged by attorneys in the Baltimore area.

from filing similarly unsupported pleadings with this court in the future. While Mrs. Sakaria's financial circumstances are somewhat less clear, and may be better than Mr. Huffman's, she should not be penalized more severely than the attorney who should have told her not to press this claim.[20]

Accordingly, for the reasons stated above, it is hereby recommended that the defendants' motion for sanctions be granted in part and denied in part as follows:

1. No sanctions be awarded against Albert D. Brault, Esquire and M. Kathleen Parker, Esquire.

2. Sanctions in the amount of $4,000.00 be awarded against William F. Huffman, Esquire; and

3. Sanctions in the amount of $4,000.00 be awarded against Elpis Sakaria.

May 5, 1991
Date

/s/ Catherine C. Blake
Catherine C. Blake
United States Magistrate Judge

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20 If this court had found perjury on Mrs. Sakaria's part concerning her February 1985 flight to Athens, (see Hearing Tr. at 109-114), a harsher sanction might have been warranted. The record does not support such a finding.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ELPIS SAKARIA	:	
	:	
Plaintiff	:	Civil Action No. HM 87-3302
	:	
v.	:	
	:	
ALLSTATE LIFE INSURANCE CO., et al.	:	
	:	
Defendants	:	

PLAINTIFF'S ANSWERS
TO DEFENDANT'S FIRST SET OF INTERROGATORIES

The plaintiff, Elpis Sakaria, by her attorney, William F. Huffman, responds to Defendant's First Set of Interrogatories as follows: re: ALLSTATE LIFE INSURANCE CO..

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.
.

4. State Jagdish Sakaria's expected and actual itinerary from his departure from Washington, D.C. on December 26, 1985 until his anticipated return home, including all airlines, flight numbers, flight arrival and departure times, destinations, layovers, lodgings, and the identity of all persons with whom he stayed or was expected to stay and identify the source of all information used or relied upon in formulating this answer.

ANSWER: Expected itinerary was as shown on attached Travel agency itinerary and passenger ticket coupon. Actual itinerary included an unexpected stop in Rome and a change of planes in Rome to proceed to Athens on using same flight number - See attached copy of Boarding Pass.

Decedent was met in Athens by Mr. Bafitis, stayed with him and his mother overnite, and drove with Mr. Bafitis next morning to Volos, where he stayed that night with Mrs. Sakaria's parents. (See copy of statement by Mr. Bafitis and Mr. Stamoulis attached)

5. Describe in detail the activities and whereabouts of Jadgish Sakaria, including routes of travel, from the time his aircraft landed at Leonard DiVinci Rome Airport until the time he boarded another flight enroute to Athens, Greece and identify the sources of such information used or relied upon in formulating this answer.

ANSWER: See attached statement from Mr. Nick Bafitis and from Mr. Labros Stamoulis.

6. Describe in detail "the aftermath of the bloody attack" that was allegedly visible or audible to Jagdish and identify all sources of such information used or relied upon in formulating this answer.

ANSWER: See attached statement from Mr. Nick Bafitis and from Mr. Labros Stamoulis.

7. Describe in detail Jagdish Sakaria's mental and physical condition immediately prior to leaving the United States on December 26, 1985, and identify all sources of such information used or relied upon in formulating this answer.

ANSWER: Mr. Jagdish Sakaria was in excellent mental and physical health immediately prior to leaving the United States on December 26, 1985, according to his wife's brother who saw him off in New York Kennedy Airport. He was elated with the thought that he would soon be seeing his child. He had just bought a Santa Claus suit at Jamesway in Laurel, Maryland. He had undergone a physical examination in September, 1985, by Dr. R. Simon, M.D., whose report is attached hereto, stating that he had no evidence of heart disease.

8. Identify all physicians, psychiatrists/psychologists, hospitals, or other health care providers who examined or treated Jagdish Sakaria during the ten (10) years prior to his death and as to each, state the dates and places of said examinations or treatments, and the nature and purpose therefor.

ANSWER: From 1975 to 1978 Jagdish Sakaria went once a year for a physical examination to Dr. ChunChien at his office in Greenbelt, Maryland; in 1978, after his accident he was seen by a physician at the Denver, Colorado Hospital who treated him for his injuries; his wife brought him back to Maryland and he was treated at Prince George's Community Hospital; he was treated by Dr. Doudoumopoulos, a neurologist in Greenbelt, Maryland; in 1979 and several times thereafter he was seen by Dr. Spiridon Koulouris, M.D., at George Washington University Hospital for follow-up concerning his head injury; he was seen by Dr. R. Simon, M.D., at New York Medical College on March 3, 1984 and September 25, 1985 for a complete physical and medical evaluation.

9. Describe any serious injury, illness or disability ever sustained by Jagdish Sakaria and for each such injury, illness, disability, include a description of the permanent/temporary nature of each injury, illness or disability; the extent of his recovery from each such injury, illness or disability; any disability rating given to him; and the identity of each health care provider who has diagnosed the injury, illness or disability.

ANSWER: The only serious injury Jagdish Sakaria ever sustained was the accident in Colorado October 20, 1978; he was diagnosed as having a head injury with comminuted fracture of the right tibia and fibula; he was attended by a Dr. Miller at the Denver Hospital; as to permanent residuals he continued to have some problems with his leg and continued to have partial amnesia; Dr. Spiridon Koulouris, M.D. at George Washington University Hospital, Washington, D.C., a neurosurgeon, diagnosed his mental impairment.

10. Describe in detail the nature and cause of any medical problems or episodes experienced by Jagdish Sakaria at any time during his trip in December 1985 and identify all sources of information used or relied upon in formulating this answer.

ANSWER: The only information available to me at this time is that which was provided by Mr. Nick Bafitis and Labros Stamoulis, the statements of both attached hereto.

11. Identify each person the plaintiff expects to call as an expert witness at trial and for such expert witnesses state:

(a) Their background, education, prior and current employment and other factors which bear upon their expertise;

(b) The specific area of expertise for which it is intended each expert will be offered as an expert witness;

(c) The subject matter as to which they will testify;

(d) The substance of the facts and opinions as to which they will testify and the basis for such facts and opinions;

(e) The substance of the facts given to them and the source of such facts;

(f) The identity of each document containing the substance of such facts or opinions as to which they will testify; and

(g) The identity of all documents prepared by any persons which arise from or relate to circumstances similar or claimed to be similar to this case upon which such expert has referred to, relied upon or used in the formation of his opinion in this case.

ANSWER: No expert witnesses have as yet been identified.

12 Describe in specific detail the events and conditions which you contend caused or contributed to the "psychological trauma" Jagdish Sakaria allegedly suffered and identify all sources of information used or relied upon in formulating this answer.

ANSWER: The events were as follows:

(a) The unexpected stopover at Rome, despite assurance by the airline that there would be no stops.

(b) The long wait on board the plane while standing on the airfield in Rome.

(c) The walk through the terminal and witnessing the aftermath of the bloody incident.

(c) The remainder of the trip to Athens.

The information was provided by Mr. Nick Bafitis and by Labros Stamoulis, per their statements attached hereto.

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I do hereby solemnly declare and affirm, under the penalties of perjury, that the matters and facts set forth in the foregoing Answers to Interrogatories are true and correct to the best of my knowledge, information and belief.

/s/ Elpis Sakaria
Elpis Sakaria

/s/ Wm F. Huffman
William F. Huffman
316 Hannes Street
Silver Spring, Maryland 20901
(Tel. 301-593-3399)
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ELPIS SAKARIA, et al.,	:	
	:	
Plaintiffs,	:	
-against-	:	Civil Action No.
	:	MJG-87-3462
TRANS WORLD AIRLINES, INC.	:	
	:	
	:	
Defendant	:	

NICHOLAS M. BAFITIS deposes as follows:

1. I reside at 4915 Lincoln Avenue, Beltsville, Maryland. I am a close family friend of Elpis Sakaria and the other plaintiffs in this action. I was also a close friend of the decedent, Jagdish Sakaria. I am the godfather of Mr. Sakaria's son, Alexander. Although I speak a little English, I am not fluent in English. My conversations with Mr. Sakaria and his wife normally were in Greek.

2. On December 27, 1985 I was in Greece with my family, visiting my daughter, who was staying in Greece at the time. On the afternoon of December 27 I met Mr. Sakaria at the airport in Athens. His wife, Elpis Sakaria, had made arrangements for me to meet her husband before I left the United States on December 21.

3. When I arrived at the airport I was told that Mr. Sakaria's flight was delayed. I was surprised to discover that his flight had stopped in Rome. I knew that Mr. Sakaria always took nonstop flights and avoided flights with intermediate stops or transfers if he possibly could. I assumed the reason he flew out of New York, rather than Washington, D.C., was so he could get a nonstop flight.

4. When Mr. Sakaria's flight arrived I observed that many of the passengers coming out of the customs area were talking excitedly about unusual things happening in Rome. When Mr. Sakaria came out, I could tell immediately that something had happened to him. He looked extremely pale and yellow, with black circles under his eyes. His eyes were swollen and seemed to glare. He was holding on to his throat and neck. He looked terrified.

5. As soon as Mr. Sakaria recognized me he started talking in Greek about the events in Rome. The first thing he said was: "Did you hear what happened to us in Rome." He described the shooting and talked about talked about [sic] seeing bodies and blood. His tone was extremely excited. He also said he was extremely thirsty because the airplane had been parked on the field for a long time with the air conditioning off. He said it had been "suffocating."

6. I asked Mr. Sakaria why he had landed in Rome rather than taking a direct flight. He became very angry. He said he didn't intend to land in Rome and that his flight was supposed to be a nonstop flight.

7. Mr. Sakaria kept saying: "What was I doing in Rome?" He wanted to call his wife immediately. I persuaded him to wait until we got to my mother's house, in Athens, where I was staying with my family. When we got there I placed the call to Mrs. Sakaria and gave her a brief account of how he had landed in Rome. She was incredulous. She told me she had booked Mr. Sakaria on a nonstop flight to Athens. Mr. Sakaria then talked to his wife excitedly about how he had landed in Rome and how terrible things had happened there. I urged Mr. Sakaria to calm down and persuaded him to come join the family in the dining room for dinner.

8. Mr. Sakaria refused to eat any food for dinner. He told the family he could not eat without throwing up. At this point my father asked: "Did all this take place right in front of you." He used the plural form of "you," referring to all of the

passengers. Mr. Sakaria replied: "No, but I saw it all when I went to the bathroom upstairs to the other floor. And then, when I saw the bodies and the blood, I vomited." The following day he again talked about how he had seen the bodies when he went upstairs to go to the bathroom. He was asked by one of his nephews if he could tell whether any of the bodies were Greek persons. He replied emotionally that the bodies were "covered up" but that they were "human." (As a result of an automobile accident in 1978 Mr. Sakaria had problems with control of his bowels and bladder and could not wait if he needed to go to the bathroom.)

9. Although the family attempted to change the conversation many times, Mr. Sakaria insisted on talking about the events in Rome. He repeatedly thanked God that he was alive. He exclaimed: "You cannot understand what bodies and what blood I saw!"

10. Mr. Sakaria related that the Captain had told the passengers that there was fighting in the airport. Immediately Mr. Sakaria became nervous and his throat became dry. He said the airplane was then parked on the field and the air conditioning was shut off. Although they opened three doors for ventilation, it was hot and "suffocating" inside the airplane. Mr. Sakaria said he got up and walked to one of the open doors to get air. He saw an armored vehicle there and soldiers with machine guns and hand grenades. He was extremely frightened because he thought they might be going to attack the plane. Mr. Sakaria had a radio with him on the airplane. He said that he and the other passengers heard about the attack on radios.

11. The following day my family and I took Mr. Sakaria to Volos, a drive that took seven hours because we made frequent stops. Although Mr. Sakaria continued to refuse any food, he drank large quantities of liquids. He continued to talk about the incident in Rome, thanking God that he was alive, and describing the bodies and the blood. At times, he broke out in tears.

12. When we arrived in Volos shortly before 2:30 p.m., Mr. Sakaria insisted on going to a travel agency to change his return ticket to another airline. He was very angry that the TWA flight had stopped in Rome when he had ordered a nonstop flight. We stopped at a travel agency, but it was closed. After waiting a while, I persuaded him to change his reservation at a later time. We proceeded to a bakery, owned by Mrs. Sakaria's sister, Eleni Fania, where Mr. Sakaria's son was staying. From there we went in two cars to Gazea, a village about 17 miles from Volos where Mrs. Sakaria's parents lived and where Mr. Sakaria's daughter was staying.

13. We had dinner that night at the house of Mrs. Sakaria's parents, Lambros and Maria Stamoulis. Mr. Sakaria continued to refuse to eat, protesting that he would vomit as he had at the airport. Several times during dinner he broke out in tears. He continued talking about the accident, talking about how lucky he was and how he would have been shot, too, if the plane had arrived only a little bit earlier.

14. The next morning I was up early with my family to go visit a monasteries [sic] in Meteora. Mr. Sakaria was apparently still asleep, and I planned to leave without him. However, Mrs. Stamoulis asked me to take Mr. Sakaria to see a doctor in Volos on our way to Meteora. She went to wake him up and found that he would not move. He was cold to the touch and had no breath to fog a mirror.

15. I took Mr. Sakaria's body to the hospital in Volos. A doctor there pronounced him dead. The doctor told me he had probably died sometime before midnight.

16. I have known Mr. Sakaria since 1967. I saw him frequently in the years and months preceding his death. Although an automobile accident in 1978 affected Mr. Sakaria's memory, I have never known him to fabricate stories or to invent accounts of things that never happened. I also never observed him to be as excited as he was about the events in Rome. Normally he was a quiet person who had little to

say. For these reasons, I am convinced that Mr. Sakaria was talking about events that really happened and that he was not imagining his account of what occurred.

17. I have personal knowledge of the facts set forth above. This affidavit has been translated to me into Greek by an interpreter. I declare under penalty of perjury that the foregoing is true and correct.

Executed March 22, 1991

/s/ Nick Bafitis
Nicholas M. Bafitis

TRANSLATOR'S CERTIFICATE

FROSSO PANTELIDES declares as follows:

I am a Greek citizen temporarily residing in the United States. I attended an American high school in Cyprus where classes were conducted in English and took additional courses, in English, Heatherleys School of Art, in London, and New York University, in New York. I have worked as a professional English/Greek interpreter for over 10 years. I have passed two tests by the United States State Department for conference interpretating and for written translations.

I certify, under penalty of perjury, that I have interpreted the foregoing affidavit into Greek to Nicholas Bafitis before he signed this affidavit and that my interpretation was true and correct to the best of my ability.

/s/ F. Pantelides
Frosso Pantelides

Dated: March 22, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ELPIS SAKARIA	:	
	:	
Plaintiff	:	
	:	
-against-	:	Civil Action No.
	:	HM-87-3302
ALLSTATE LIFE INSURANCE COMPANY, et al.	:	
	:	
Defendants	:	

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S OBJECTIONS TO THE MAGISTRATE'S REPORT

ELPIS J.G.B. SAKARIA declares as follows:

1. I am the plaintiff in this action. The decedent, Jagdish Sakaria, was my husband. This affidavit is submitted in support of Plaintiff's Objections to the Report of The Hon. Catherine C. Blake, dated May 8, 1991, which recommends imposing sanctions of $4,000 against me personally. The purpose of the affidavit is to clarify certain matters that may not be clear from the other papers in the record in this case.

2. My husband, Jagdish Sakaria, was a devout, practicing Hindu. His religion taught him that any kind of violence was sacrilege. By temperament, and by upbringing, he was repulsed by violence, even violence that he saw in shows on television.

3. Neither English nor Greek was my husband's native language. My husband could speak Greek passably, but he could not read or write Greek. When he spoke in Greek his use of words was sometimes imprecise.

4. English is not my native language, and I have never formally studied the English language. When I testified in depositions, when I submitted affidavits and other papers to Court, and when I signed answers to interrogatories in this case, I tried to be accurate in my use of English. However, I am not always familiar with the exact meanings of English words, and I cannot always express what I mean precisely in English.

5. Following his automobile accident in 1978 my husband suffered serious loss of memory. However, he was able to recall things accurately when properly stimulated. In the five years preceding his death, I never observed him to have hallucinations or to invent matters that did not really happen. The only occasion on which I observed my husband to invent stories was an occasion immediately following his accident when he was under heavy medication.

6. As a result of his accident, my husband was unable to control his bowel and bladder movements. In December of 1985, he was able to exercise some bowel conditioning, but had to move his bowels at specific times. He could not wait if rest room facilities were not available.

7. On or about December 12, 1985, I telephoned TWA to inquire [sic] a flight from New York to Athens. I was under the impression that TWA had a nonstop flight because I had booked passage for myself on what I believed and requested to be a nonstop flight in February, 1985. However, my connecting flight from Baltimore/Washington Airport was late, and I was re-booked on TWA flight to London, using the New York/Athens ticket. Thus, although I had a reservation on Flight 840 in February, 1985, I never in fact flew on Flight 840, ever.

8. When I telephoned TWA on December 12, I specifically asked the reservations clerk for a nonstop flight from New York to Athens. She transferred me to someone who handled international flights. Again, I specifically

requested a nonstop flight. I used either the term "nonstop" flight or a flight "without stops." I am certain that I told the clerk who made the reservation that the flight should be without stops. The clerk then told me that there was space on a flight which turned out to be Flight 840, and asked if I would like to make a reservation. I conferred with my husband and then made the reservation.

9. Because I requested a nonstop flight and was promised by TWA that my husband was booked on a nonstop flight, I have frequently asserted that TWA Flight 840 was a "nonstop flight." By this I mean that TWA represented to me that the flight would be nonstop, issued a ticket that showed a nonstop flight from New York to Athens without an intermediate stopover in Rome, and never gave me or my husband notice of the stop in Rome. I have never contended that TWA did not intend for my husband's flight to make the stop in Rome.

10. In November, 1988, I signed answers to interrogatories which had been promulgated by the defendant insurance companies in this case. The interrogatories had been prepared by my attorneys. A copy of my answers to interrogatories from defendant Allstate Life Insurance Co. is attached as Exhibit A to this affidavit. A copy of my answers to interrogatories from defendant Minnesota Mutual is attached as Exhibit B.

11. In both sets of answers I stated that my husband was in "excellent physical and mental health" at the time he undertook his flight to Greece. By this I meant that he was not suffering from any diseases, specifically heart disease, that he had recovered physically from his automobile accident, and that he was not suffering from any mental disease or any delusions that may have caused him to imagine the events he described in Rome.

12. When answering the interrogatories, I described my husband's mental health as I thought it to be from my own observations. I am not a doctor, and I do not know the techni-

cal meaning of the term "mental health." However, my statement that my husband was in excellent mental health has been confirmed by two doctors who examined my husband following his automobile accident. A letter from Dr. T. Chanchien, my husband's family physician, is attached as Exhibit C to this affidavit. It confirms that, my husband's memory loss and neurologic deficit "would not constitute mental illness." In addition, a letter and affidavit from a neurologist who examined my husband, Dr. Ayub K. Ommaya, confirm that my husband was not suffering from mental disease as a result of his head injury.

13. In further support of my answers to interrogatories, I have obtained affidavits from three family friends who observed my husband immediately before his departure for Athens. A copy of the affidavit of Anthony Centodocati is attached as Exhibit D; it attests that my husband was "in good physical health and in an alert state of mind." A copy of the affidavit of Lillian Hillman is attached as Exhibit E; it states that my husband "appeared to be in excellent physical and mental condition." A copy of the affidavit of Rev. Demetrius Meintanis is attached as Exhibit F. Rev. Meintanis states that my husband "appeared to me in very good physical health and very good state of mind."

14. Defendant Allstate Insurance Company was aware that my husband suffered memory problems as a result of his accident. As a result, he was excluded from automobile insurance from 1978 to 1983. In 1983 the exclusion was removed, indicating that Allstate believed his mental health was good enough for him to be able to drive a car. Exhibit G, attached, is a copy of a claims form from Allstate that makes note of the date the exclusion was removed. Minnesota Mutual also investigated my husband's mental and physical condition extensively in 1983 in connection with his disability claim. A copy of Minnesota Mutual's notice of disability was submitted as an exhibit to Defendants' Motion for Summary Judgment.

15. In describing my husband's mental health as "excellent," I had no intention of misleading the defendants concerning my husband's head injury and consequent memory impairment. On the contrary, in the answers to the Allstate Interrogatories I stated that my husband had "partial amnesia" and "mental impairment" (Exhibit A, Answer No. 9). I also knew that Allstate was aware of my husband's condition because they had excluded him from the automobile policy and then reinstated him. Finally, I knew that Allstate had obtained access to medical records and reports concerning my husband in the course of their investigation of my claim for insurance. I had given Allstate an authorization to obtain my husband's medical records. A copy of the authorization is attached as Exhibit H.

16. I also had no intention of concealing my husband's problems with bowel and bladder control when I described his physical health as "excellent." I did not consider these control problems to be a matter of "health," since they did not involve any disease.

17. I have never studied law, and I know nothing about the law of evidence. Throughout these proceedings, I have relied on my attorneys to advise me about how my case should be handled. I have always believed, and I continue to believe, that my husband actually saw bodies and blood when his aircraft stopped in Rome, and that the incident inspired such terror that it caused his heart attack. I was never advised by any of my attorneys that my claim was frivolous, or that I should abandon it.

18. Finally, I should point out that the Magistrate was mistaken in her Report and Recommendation on sanctions when she stated that I had "net income of $143,825.00 in 1985 and $167,262.00 in 1986" (Sanctions Report and Recommendations at page 18). Exhibit I, attached, is a copy of an affidavit from my accountant. It establishes that my net income after taxes in 1985 was $2,169. In 1986 I had a net loss of $19,531.

This affidavit was previously submitted to the court on November 26, 1990.

19. I declare, under penalty of perjury, that the foregoing is true and correct.

/s/ Elpis J.G.B. Sakaria
Elpis J. G. B. Sakaria

Executed June 25, 1991

No. 92-489

FILED
OCT 19 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ELPIS SAKARIA,

Petitioner,

v.

ALLSTATE LIFE INSURANCE COMPANY
MINNESOTA MUTUAL LIFE INSURANCE COMPANY
AMEX LIFE ASSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL ESHER YAGGY*
MICHAEL S. BARRANCO
DIANE M. LANK
PIPER & MARBURY
36 South Charles Street
Baltimore, Maryland 21201
(410) 539-2530

*Counsel of Record

BEST AVAILABLE COPY

THE DAILY RECORD COMPANY, 11 EAST SARATOGA STREET, BALTIMORE, MD 21202

QUESTIONS PRESENTED

1. Whether this Court should consider petitioner's argument that the "bad faith" exception standard is not "objective reasonableness" when that issue not was preserved through objections at the trial court level or on appeal, and is based on a false premise.

2. Whether the District Court properly awarded sanctions against petitioner on the grounds of Rule 11 and the bad-faith exception to the American Rule, when it found that she had misled respondents in her answers to interrogatories, was the gatekeeper for all factual information, and was aware of the lack of support for her claim, even though she was represented by counsel.

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No. 92-489

In The

Supreme Court of the United States

October Term, 1992

ELPIS SAKARIA,

Petitioner,

v.

ALLSTATE LIFE INSURANCE COMPANY
MINNESOTA MUTUAL LIFE INSURANCE COMPANY
AMEX LIFE ASSURANCE COMPANY,

Respondents

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

In December, 1987, Elpis Sakaria, petitioner, ("Sakaria") filed a lawsuit against respondents, Allstate Life Insurance Company, AMEX Life Assurance Company, and

Minnesota Mutual Life Insurance Company (the "Insurers"),[1] claiming over One Million Dollars ($1,000,000) in accidental death benefits arising out of the death of her husband, Jagdish Sakaria. The Insurers issued the accidental death policies to Sakaria's deceased husband, who died on December 29, 1985 in Greece.[2]

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[1]Allstate Life Insurance Company is a subsidiary of Allstate Insurance Company, which is a subsidiary of Sears, Roebuck & Co., a publicly-traded corporation. AMEX Life Assurance Company is a subsidiary of American Express Travel Related Services Company, Inc., which is a subsidiary of American Express Company, a publicly-traded corporation. Minnesota Mutual Life Insurance Company has no parent company. No respondent has subsidiaries, other than wholly-owned subsidiaries.

[2]Sakaria now alleges many "facts" that that she never presented to the District Court prior to the entry of summary judgment or prior to the Report and Recommendation regarding sanctions. Some allegations are presented for the first time in the petition for certiorari. The Insurers take exception to all allegations not supported prior to the entry of the sanctions Report and Recommendation. These allegations include the following:

1. "When Mr. Sakaria arrived in Athens, he was met by . . . Labros Stamolous [sic]." Pet. 2.

2. "Mr. Bafitis stated that Mr. Sakaria, was 'extremely pale and yellow . . .'" Pet. 2-3.

3. "Mr. Sakaria related that the captain had informed the passengers that there was fighting at the airport." Pet. 3.

4. "[Decedent] reported seeing bodies, covered with sheets, when he visited a men's room in the Rome airport." Pet. 3.

5. "Mr. Sakaria refused dinner that evening. . ." Pet. 3.

6. "Mr. Sakaria [broke] out in tears several times." Pet. 3.

7. "Mrs. Sakaria . . . provid[ed] [the Insurers] with . . . a narrative of Mr. Sakaria's medical conditions."

In her suit, Sakaria claimed that her husband died due to the "direct effects of the psychological trauma which he suffered during the course of his travel from Washington, D.C. to Athens, Greece" after "all passengers" on his flight viewed "the bloody aftermath" of a terrorist attack at the Rome airport on December 27, 1985. *Complaint*, ¶¶ 12, App. 3. At no time did Sakaria make any allegation that the deceased was physically harmed as a result of the attack or its aftermath.

During the next two years, the Insurers engaged in discovery. They propounded interrogatories and requests for production on Sakaria, seeking any factual basis for Sakaria's claim. Sakaria's Answers to Interrogatories, served nearly one year after suit was filed and after repeated requests, merely repeated the allegations contained in her complaint.

The Answers to Interrogatories, signed by Sakaria under penalties of perjury, referred repeatedly to two statements that she personally secured and translated. One statement was that of her father, Labros Stamoulis, a Greek citizen; the second was that of a Greek-speaking close family friend, Nicholas Bafitis. App. 21 (Stamoulis statement); App. 22 (Bafitis statement). Those statements, in turn, relied entirely on purported statements of the decedent. For example, Sakaria claimed that "the aftermath of the bloody attack" was visible to decedent, and cited the Bafitis and Stamoulis hearsay statements. Sakaria further stated, under oath, that "[t]he only information available to me at this time is that which was provided by Mr. Nick Bafitis and Labros Stamoulis, the statements of both attached hereto." Pet. App. 4b.

In her Answers to Interrogatories, Sakaria also claimed that her husband was "in excellent mental and physical health

immediately prior to leaving the United States . . ." Pet. App. 2b.

Through the course of discovery, the Insurers ascertained that, contrary to Sakaria's Answers to Interrogatories, the decedent had not been exposed to either the attack or its aftermath and could not have heard grenades exploding or any "attack" occurring outside the aircraft. Both the Stamoulis and Bafitis statements were wholly unreliable. Indeed, the plane did not land until after the attack. App. 10. The Insurers located and deposed passengers, who agreed unanimously that at no time did they see the attack or its aftermath; instead, they were kept in a safe, secure area. The passengers also disputed the Bafitis hearsay statement that the aircraft was "suffocating." App. 10.

Finally, the Insurers independently learned that the decedent was 100% mentally and physically disabled, as a result of an automobile-pedestrian accident six years prior. Manifestations of decedent's disability included confabulations, paranoia, and hearing non-existent noises. App. 9.

At no time did Sakaria or her counsel[3] undertake any

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[3]With the petition for certiorari, Sakaria has engaged her fifth set of counsel. Sakaria engaged one firm to file suit; it withdrew before answering discovery or participating in any manner; Mr. Huffman, a sole practitioner, represented Sakaria through summary judgment proceedings; Sakaria retained a third set of counsel through trial court sanctions proceedings, until the magistrate judge issued the Report and Recommendation recommending sanctions against both Sakaria and Mr. Huffman; Sakaria retained a fourth set of counsel to file objections to the Report and

discovery or furnish any facts supporting her claim. Instead, in furnishing information to her expert, during her deposition, in her opposition to the motion for summary judgment, and even through the initial sanctions proceedings, Sakaria continued to rely entirely on the Bafitis and Stamoulis hearsay statements. The passengers, unanimously and under oath, contradicted decendent's hearsay statements.

On October 16, 1989, the Insurers filed a motion for summary judgment, demonstrating that no facts existed that would entitle Sakaria to accidental death benefits under applicable law. On that same date, Sakaria's deposition was taken in her related lawsuit against TWA, in which she admitted that she had no facts to support the allegations made in her complaint. Pet. App. 23a & n. 14.

Sakaria opposed the Insurers' motion for summary judgment, but failed to attach any affidavits, declarations, or point to any testimony in the depositions that supported her opposition. She continued to rely on the Bafitis and Stamoulis hearsay statements that she, personally, had secured.

The magistrate judge, to whom the motion for summary judgment had been referred for a report and recommendation, recommended to the District Judge that the Insurers' motion be granted. Sakaria did not object or take any exceptions to the magistrate judge's Report and Recommendation, and the trial court entered summary judgment on February 12, 1990. App. 20.

Recommendation, who remained through the appeal to the Fourth Circuit; a fifth set has now been retained for Supreme Court proceedings.

On March 26, 1990, the Insurers filed their motion for sanctions against, *inter alia*, Sakaria, which she opposed. On November 5, 1990, the magistrate judge held a hearing, at which Sakaria requested she be heard personally. On May 8, 1991, the magistrate judge issued a Report and Recommendation, recommending that sanctions be awarded against Sakaria and her counsel in the amount of $4,000 each.[4]

The Report and Recommendation found that Sakaria was subject to sanctions on two grounds: Rule 11, Fed. R. Civ. P., and the bad-faith exception to the American Rule. Only after the Report and Recommendation were issued did Sakaria furnish the affidavits of herself and Mr. Bafitis that she now submits in her appendix at Pet. App. 6b-16b. The District Court, in a separate opinion, adopted the magistrate judge's Report and Recommendation, and also found sanctions warranted under both Rule 11 and the bad-faith exception.

At no time, in her objections the Report or Recommendation, in her brief on appeal to the Fourth Circuit, or in oral argument at the Fourth Circuit, did Sakaria argue that she was sanctioned solely under the "bad-

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[4]Interestingly, Sakaria repeatedly suggests that the sanction involved "fee shifting," but failed to bring to the Court's attention that the Insurers' legal fees and expenses through summary judgment exceeded $100,000. The Report and Recommendation found that the fees were "not excessively high," given that over $1,000,000 was at stake. Pet. App. 26a. As noted in the Report and Recommendation, the sanction was "well below what undisputably would be a 'reasonable attorney's fee.'" Pet. App. 26a.

faith" exception, or that the District Court improperly used an objective standard in measuring her bad faith.

Sakaria seeks a writ of certiorari after the Fourth Circuit, in a 2-sentence summary affirmance of the actions of the District Court, termed her appeal "without merit." Pet. App. 4a.

SUMMARY OF ARGUMENT

For the first time, Sakaria now argues that sanctions were recommended by the magistrate judge and awarded by District Court on the sole basis of "bad faith" as applied through "objective reasonableness," and that an objective test is inappropriate in applying the bad-faith exception.

Sakaria's argument ignores the plain language of the Report and Recommendation, and the plain language of the District Court's Memorandum. Moreover, plaintiff now attempts to raise the question of an inappropriate standard for the first time in a petition for writ of certiorari.

Seizing upon only one of many reasons cited by the District Court in adopting the Report and Recommendation, Sakaria additionally argues that she should be excused from sanctions because, according to the District Court, her lawyer failed to advise her to dismiss the action. In her opposition to the Insurers' Motion for Sanctions, she at no time claimed that she proceeded only on advice of counsel. Only now, after the time had passed when the Court and the Insurers could question her former counsel, did she attempt to set forth this argument. The record is devoid of any colorable evidence that addresses advice rendered by her counsel to her, other than her own self-serving statement. Moreover,

her argument ignores the unusually active role she played in investigation, discovery and advocacy.

ARGUMENT

I. Sakaria Improperly Seeks Review Of Issues Not Previously Raised.

Sakaria now argues that the magistrate judge improperly based the Report and Recommendation on bad faith, and improperly applied an objective standard to the finding of bad faith. Sakaria has not previously taken this position.

Because the District Court referred the sanctions proceeding to a magistrate judge, Sakaria has had two opportunities to raise the argument she now raises for the first time. She had the opportunity to raise it in her objections to the Report and Recommendation. Had she properly preserved her argument at that stage, she had the opportunity to present her argument in her appeal to the Fourth Circuit. She did neither.

A. Sakaria Did Not Object To The Report and Recommendation On The Grounds That The Wrong Standard Was Applied.

To the extent that Sakaria now argues that the magistrate judge applied an objective test in determining Sakaria's bad faith, she has waived that argument by not raising it in her objections to the Report and Recommendation. In her objections, Sakaria chose to argue that her conduct was justified, even if misleading.

The waiver analysis begins by reference to the procedure to be followed in objecting to a report and recommendation

issued by a magistrate judge. 28 U.S.C. § 636 provides, in relevant part, that:

> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made . . . .

The Fourth Circuit has held, since 1984, that failure to raise objections constitute waiver of those objections. *United States v. Schronce*, 727 F.2d 91, 94 (4th Cir.), *cert. denied*, 467 U.S. 1208 (1984). The Fourth Circuit based its holding on the incongruity that an opposite holding would create. The court noted that without such a rule, parties would be encouraged to bypass the objections phase, and proceed directly to appeal. The court cited as an analogous circumstance the rule that "prevents a party from raising an issue before a circuit court of appeals that was not raised before the District Court." *Id.*

In *Thomas v. Arn*, 474 U.S. 140 (1985), this Court reviewed whether the waiver rule adopted by the Fourth and other circuit courts of appeals met statutory and constitutional muster. The Court noted that such waiver rules "are supported by sound considerations of judicial economy." *Id.* at 147. The Court stated that waiver rules serve a useful purpose in "precluding appellate review of any issue not contained in objections, [and] prevent[ing] a litigant from 'sand-bagging' the district judge by failing to object and then appealing." *Id.* at 147-48. The Court also noted that the wavier rules are applicable to both factual and legal issues. *Id.* at 150.

The reasoning set forth in *Thomas* and *Schronce* are applicable here. Sakaria is now raising, for the first time, the issue of whether the magistrate judge applied an objective test to the bad-faith finding. Her untimliness deprives the trial court of the opportunity to review that issue. Sakaria attempts to "sandbag" the District Court, the precise harm against which this Court cautioned in *Thomas*, *supra* at 147-48.

During her appeal to the Fourth Circuit, Sakaria's then-counsel apparently concluded that either Sakaria had waived the objective standard argument, or that the lower court had applied the appropriate standard. In any event, Sakaria did not raise her newly-minted argument in her appeal to the Fourth Circuit. Had she done so, the argument would be precluded by the *Schronce* waiver.

Sakaria should not now be given the opportunity to raise in this Court what she would have been barred from raising in the Fourth Circuit under the waiver rule. The Fourth Circuit noted in *Snyder v. Ridenour*, 889 F.2d 1363, 1366 n. 2 (4th Cir. 1989) that "[i]t occurs to us that the objection now made to the magistrate's report may well be an afterthought, at best, by new counsel." Given the numerous sets of counsel retained by Sakaria, a similar situation exists in the case at bar. *See* footnote 3, *supra*.

B. Assuming For The Purposes Of Argument That Sakaria Could Have Raised The Objective Standard Argument In Her Appeal To The Fourth Circuit, She Did Not Do So, Which Bars Consideration By This Court.

The *Schronce* waiver rule is derived, in part, from the general rule that issues not preserved in a lower court should

not be considered by the reviewing court. In *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), this Court discussed the reasons underlying this established long-established rule:

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

This Court has long applied the rule that issues not properly preserved will not be reviewed, absent exceptional circumstances. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (citing *Hormel, supra*); *Lawn v. United States*, 355 U.S. 339, 362 n. 16, and cases cited therein. Sakaria has not argued, and cannot argue, that exceptional circumstances exist here.

The reasons that Sakaria chose not to raise the objective standard issue in the Fourth Circuit are irrelevant; what is relevant is that she did not. For that reason, her petition should be denied.

II. Sakaria's Argument That The Court Improperly Applied An "Objective Reasonableness" Standard To Its Sanction Based On Bad Faith Is Unsupported By The Record.

A. The Standard Of Review Of The District Court's Decision Is Abuse Of Discretion

The appropriate standard for reviewing sanctions decisions by District Courts is abuse of discretion. *Chambers v. NASCO, Inc.*, 501 U.S. ___, 111 S. Ct. 2123, 115 L. Ed.2d 27, 52 (1991) (sanctions imposed under the inherent power of the court); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (sanctions imposed under Rule 11, Fed. R. Civ. P.). The abuse-of-discretion standard is warranted because inquiry into conduct of parties and attorneys is necessarily fact based. Thus, the District Court is in the best position to assess the circumstances justifying sanctions. *Id.* at 404-405.

This standard is particularly appropriate in this action. The magistrate judge who presided over the sanctions proceedings was the same magistrate judge who considered the Insurers' motion for summary judgment. The magistrate judge held a hearing on the Insurers' motions for sanctions, and permitted Sakaria to testify. The magistrate judge was able to consider and weigh, first-hand, Sakaria's testimony, demeanor and conduct.

B. The Facts Set Forth In The Report And Recommendation Support Imposition Of Sanctions Under The Appropriate Standard

Assuming that the Court finds exceptional circumstances exist to permit review of issues not raised below, the petition

remains unjustified on the merits. Sakaria's first "question presented" is based on the incorrect premise that the court held Sakaria to an "objective reasonableness" standard in assessing sanctions based on bad faith, and ignores the Rule-11 basis.[5] Notwithstanding Sakaria's omission, on the bad-faith grounds, the court did not apply an "objective reasonableness" standard, but provided specific, undisputed facts that provide direct evidence of Sakaria's bad faith.

The Report and Recommendation set forth the appropriate test for determining sanctions:

> Parties as well as attorneys also may be sanctioned under the "bad faith" exception to the American Rule, permitting a court to award attorneys' fees against a losing party or attorney who has "'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'"

Pet. App. 19a-20a (citing *Blue v. U.S. Dept. of Army*, 914 F.2d 525, 537 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 1580 (1991), quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975)).

Contrary to Sakaria's argument at 6 that the court made "no finding" of bad faith, the record demonstrates that magistrate judge indeed made a finding that Sakaria had

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[5]Sakaria does not address that the court recommended sanctions both under Rule 11 and the bad-faith exception. See Pet. App. 19a-20a. Sakaria does not argue that the Rule-11 sanctions, based on signing misleading Answers to Interrogatories, are inappropriate. However, the court did not distinguish between sanctions warranted under Rule 11 and those warranted under the bad-faith exception.

proceeded in bad faith, and provided numerous examples supporting the finding. The court pointed to Sakaria's misleading "answers to interrogatories [signed] under the penalties of perjury that claimed her husband was in excellent physical and mental health and that he saw the aftermath of the terrorist attack in Rome . . . it was incumbent on [Sakaria] to disclose more accurate information concerning her husband's mental condition." Pet. App. 22a-23a.

Moreover, the court pointed several other examples of Sakaria's bad faith: (1) an affidavit authored by Sakaria demonstrating her "unreasonable and intransigent attitude," Pet. App. 24a; (2) Sakaria's contradictory statements in Answers to Interrogatories and her in-court testimony, Pet. App. 23a, n. 13; (3) Sakaria's admission, after discovery had closed, that she had no knowledge of what happened in Rome, Pet. App. 23a-24a, n. 14; and (4) Sakaria's unsupported but signed statement in her affidavit submitted to the court that the plan flew "'into a deadly terrorist attack,'" Pet. App. 24a, n. 15.

The Report and Recommendation uses subjective language; the court did not state that Sakaria "knew *or should have known*" that her conduct was unreasonable. Rather, the court detailed the specific conduct undertaken by Sakaria, using verbs demonstrating Sakaria's actual knowledge of her own conduct.

The examples of Sakaria's actual conduct followed the court's statement that Sakaria's conduct warranted sanctions under the bad-faith exception. Although the court did not label these examples as subjective or objective, the examples cited in the court's litany are all subjective in nature, by any measure.

The court gave further evidence that it considered the subjective nature of the bad-faith exception by noting that Sakaria "is an educated an intelligent woman with no excuse for her continued unreasonable attempts to maintain this lawsuit." Pet. App. 25a (footnote omitted.)[6] Had the court applied an "objective" test, Sakaria's academic credentials would be irrelevant.

Thus, the first question posed by Sakaria is flawed from the outset. Sakaria either misreads or misinterprets the opinions below. Although the magistrate judge stated that both Sakaria and her counsel prosecuted the case beyond the point of "objective reasonableness," that phrase was mentioned only in the context of efforts that should have been made by Sakaria and her counsel subsequent to Sakaria's experts deposition. Pet. App. 22a. The statement containing the phrase "objective reasonableness" and the example that followed related to Sakaria's expert did not form any basis for sanctions imposed on Sakaria. Moreover, the Report and Recommendation defined "objective" bad faith as "'reckless or callous disregard for the law'" or "'when a party . . . recklessly maintains an action long after it becomes clear that the claims at issue are no longer colorable.'" Pet. App. 20a (quoting, respectively, *Harris v. Marsh*, 679 F. Supp. 1204, 1376 (E.D.N.C. 1987), *vacated in part*, 123 F.R.D. 204 (E.D.N.C. 1988), *aff'd in part, rev'd in part, Blue v. U.S. Dept. of Army, supra*; citing *In re TCI Ltd.*, 769 F.2d 441, 442 (7th Cir. 1985); and *Harris v. Marsh, supra* at 1377; citing *Nemeroff v. Abelson*, 704 F.2d 652, 569-60 (2d Cir. 1983).

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[6]The Court noted that Sakaria has a BS in mathematics and physics from Fisk University, graduating magna cum laude and Phi Beta Kappa, and later received an MBA from Wayne State. Pet. App. 25a n. 16.

Sakaria's argument engages in sophistry. She argues isolated semantics in a vacuum, rather than considering the Report and Recommendation as a whole. The Report and Recommendation, although using the word "objective," cites law that provides an appropriate standard ("reckless and callous") and details party-specific facts to support its recommendation.

Curiously, Sakaria further ignores that bad faith itself justifies a Rule 11 sanction for papers filed, although bad faith is no longer a prerequisite for a Rule 11 violation. Thus, a finding of bad faith is itself a Rule 11 violation for those papers which Sakaria signed, such as her Answers to Interrogatories and other affidavits she supplied to the Court.

III. The Statement In The Memorandum That Counsel "Failed To Advise Plaintiff To Dismiss The Case" Has No Colorable Basis And Does Not Warrant Consideration Of That Issue By This Court.

In adopting the Report and Recommendation of the magistrate judge, the District Court issued a Memorandum that augments the Report and Recommendation. The Report and Recommendation endorsed sanctions against counsel because "his signature on the opposition to the defendants' motion for summary judgment constituted a violation of Rule 11 . . . ." Pet. App. 22a. The Memorandum adopts the Report and Recommendation, and expanded the magistrate judge's recommendation by listing conduct supporting the Rule-11 basis for counsel's signature on the opposition: failing to pursue discovery, failing to obtain a stay,, failing to attempt to develop admissible evidence, and "failing to advise plaintiff to dismiss the case."

The sole basis to support the statement that counsel failed to advise plaintiff to dismiss the case is found in Sakaria's self-serving affidavit, supplied only after the motion for sanctions was fully briefed by all parties, after a hearing was held, and after the magistrate judge issued the Report and Recommendation. Pet. App. 15b, ¶ 17. Curiously, during the development of the record Sakaria never argued that she acted on advice of counsel, or that she was not advised to dismiss her case.

Despite Sakaria's current position that her "vigorous litigation" was "taken with the advice of counsel," Pet. App. 7, that statement simply has no support in the record. Indeed, certain facts suggest that the litigation was driven by Sakaria rather than her counsel. *See, e.g.*, Report and Recommendation, Pet. App. 12a (noting that first counsel retained by Sakaria had "substantial difficulties in obtaining answers [to discovery]" and withdrew on the grounds of "irreconcilable differences.")

Sakaria does not dispute that represented parties, as well as their attorneys, are subject to sanctions. *Business Guides, Inc. v. Chromatic Communications Enterprises*, 498 U.S. ___, 111 S.Ct. 922, 932, 112 L.Ed. 2d 1140, 1157 (1991); *Chambers v. NASCO, Inc.*, *supra*. As the Supreme Court noted in *Business Guides*, "[q]uite often it is the client, not the attorney, who is better positioned to investigate the facts supporting a paper or pleading." *Id.* at 498 U.S. ___, 112 L.Ed. at 1158. *Business Guides* also holds that a party, for Rule 11 purposes, is subject to the same objective standard as her lawyer.

Sakaria's timing prevented the Insurers from pursuing with her attorneys whether her "advice of counsel" statement was truthful, although her statement is an obvious waiver of

the attorney/client privilege. Of course, to the extent that Sakaria believes she was wrongfully sanctioned because of inadequate legal counsel, her remedy lies against that counsel.

More importantly, as is demonstrated above, sanctions against Sakaria personally were warranted not because of any act or omission by her counsel, but rather by her own admitted conduct. She should not now be permitted to rely on her own self-serving statement that has never be subjected to scrutiny by the court or by any other party to defeat sanctions imposed upon her for her own conduct.

The record is clear as to why Sakaria was sanctioned; the record is devoid of any colorable evidence that Sakaria's sanctioned conduct was taken on advice of counsel. Sakaria alone had the opportunity to develop the record as to the relationship between she and her counsel; she chose not to make "advice of counsel" an issue until too late.

Whether sanctioning a party is appropriate when the party is acting under advice of counsel necessitates a fact-based inquiry as to what advice, if any, was rendered to the party. Sakaria did not develop the necessary facts, although she had the unique opportunity to do so. She should not be permitted, then, to litigate the issue which is simply not ripe.

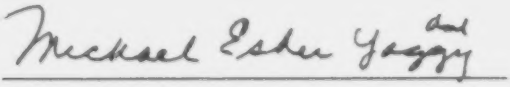
In summary, were the Court to accept Sakaria's argument, the consequences would require full inquiry into all advice rendered by counsel in every case at the initial stage of sanctions proceedings. Although some cases may warrant such inquiry, two considerations in this action mitigate against such inquiry. First, the conduct by Sakaria that the Report and Recommendation cited as the basis for sanctions is conduct regarding matters peculiarly within

Sakaria's knowledge and control. Second, Sakaria had repeated opportunities to provide specific facts concerning her contention that she acted "on advice of counsel." At no time has Sakaria disputed that any act for which she was sanctioned was taken on advice of counsel.

CONCLUSION

For these reasons, the Insurers respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



Michael Esher Yaggy
(Counsel of Record)
Michael S. Barranco
Diane M. Lank

Piper & Marbury
36 South Charles Street
Baltimore, Maryland 21201
(410)539-2530

October 15, 1992

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ELPIS SAKARIA,
P.O. Box #321
Beltsville, MD 20705

Plaintiff,

v. Civil No: HM-87-3302

ALLSTATE LIFE INSURANCE
COMPANY
60 Allstate Plaza
North Brook, IL 60062

SERVE: Insurance Commissioner
501 St. Paul Place
7th Floor
Baltimore, MD 21202

MINNESOTA MUTUAL LIFE
INSURANCE COMPANY,
400 No. Robert Street
St. Paul. MN 55164

SERVE: Insurance Commissioner
501 St. Paul Place
Baltimore, MD 21202

AMERICAN EXPRESS TRAVEL
RELATED SERVICES
7777 American Expressway

Ft. Lauderdale, FL 33337

SERVE: Insurance Commissioner
501 St. Paul Place
Baltimore, MD 21202

Defendants.

* * * * * * *

COMPLAINT

1. Jurisdiction is conferred on this Court by virtue of 28 U.S.C. Section 1332.

2. The amount in controversy exceeds $10,000 dollars.

3. The Plaintiff, Elpis Sakaria, is and at all times relevant hereto was a resident of the State of Maryland.

4. The Defendant, American Express Travel Related Services is a corporation who, among other things, issues life insurance to holders of the American Express card. Its principle place of business is in the State of Florida.

5. The Defendant, Minnesota Mutual Life Insurance Company is a corporation which issues life insurance. Its principle place of business is in the State of Minnesota.

6. The Defendant, Allstate Life Insurance Company is a corporation which issues life insurance. Its principle place of business is in the State of Illinois.

7. On December 26, 1985, at approximately 3:35 P.M., Jagdish Sakaria left Washington National Airport on Trans World Airlines, flight 744 bound for New York's Kennedy Airport.

8. On December 26, 1985, at approximately 6:55 P.M., Mr. Sakaria left the New York Kennedy Airport on Trans World Airlines flight 840 bound for Athens, Greece.

9. On December 27, 1985, TWA flight 840 landed at Rome's Leonardo DaVinci Airport apparently for a change of planes before ultimately reaching Athens, Greece.

10. At or about the time flight 840 was approaching the Rome airport, terrorists staged an attack on the airport killing several people.

11. After flight 840 landed in Rome, TWA officials kept the passengers on the plane until it was established that the airport was secure.

12. Thereafter, those aboard flight 840 were ushered through the airport terminal to another plane. On this trip through the airport, the aftermath of the bloody attack was visible to all the passengers.

13. Mr. Sakaria arrived in Athens on December 27, 1985. On arriving in Athens, Mr. Sakaria's state was one of agitation and distress at the events which he had encountered on his trip.

14. On December 28, 1985, Mr. Sakaria traveled to the home of his in-laws in the village of Aghios Georgios Nilias in Magnisia, Greece. His state of psychological shock and distress over the events in Rome continued.

15. On December 29, 1985, Mr. Sakaria was discovered dead in his bed.

16. Autopsy performed in Greece demonstrated that Mr. Sakaria had died of an acute myocardial infarction. There was no evidence of pre-existing cardiovascular disease.

COUNT I

17. The Plaintiff, Elpis Sakaria, adopts and incorporates herein the allegations contained in paragraphs 1 through 16.

18. Mr. Sakaria purchased his airline ticket for flights 744 and 840 using his American Express card. As such, he was entitled to life insurance benefits available for cardholders through the American Express Travel Related Services.

19. That policy, No. DGA03251111, contained within it, provisions for recovery in the event of accidental death.

20. Mr. Sakaria's death was due to the direct effects of the psychological trauma which he suffered during the course of his travel from Washington, D.C. to Athens, Greece. Therefore, his surviving spouse, Elpis Sakaria, is entitled to recover the sum of $100,000 for his accidental death.

21. On January 30, 1985, Mrs. Sakaria timely made claim for benefits under the policy.

22. By letter dated August 6, 1987, the American Express Travel Related Services, through its subsidiary AMEX Life Assurance Company, wrongfully denied the claim in contradiction to the terms of its policy.

WHEREFORE, Plaintiff claims damages against American Express Travel Related Services in the amount of $100,000 plus interest, costs and other remedies that the Court may feel are appropriate.

COUNT II

Plaintiff, Elpis Sakaria, adopts and incorporates herein the allegations contained in paragraphs 1 through 16.

23. At the time of his death Mr. Sakaria was insured under a life insurance policy issued by Minnesota Mutual Life Insurance Company.

24. That policy, No. 0373142, contained within it provisions for recovery in the event of accidental death.

28.[sic] Mr. Sakaria's death was due to the direct effects of the psychological trauma which he suffered during the course of his travel from Washington, D.C. to Athens, Greece. Therefore, his surviving spouse, Elpis Sakaria, is entitled to recover the sum of $100,000 for his accidental death.

29. On January 30, 1985, Mrs. Sakaria timely made claim for benefits under the policy.

30. By letter dated, December 12, 1986, the Minnesota Mutual Life Insurance Company wrongfully denied the claim in contradiction to the terms of the policy.

WHEREFORE, Plaintiff claims damages against Minnesota Mutual Life Insurance Company in the amount of $100,000, plus interest, costs and other remedies that the Court feels appropriate.

COUNT III

Plaintiff, Elpis Sakaria, adopts and incorporates herein the allegations contained in paragraphs 1 through 16.

31. At the time of his death Mr. Sakaria was insured under a life insurance policy issued by Allstate Life Insurance Company.

32. That policy No. 05003200, contained within it, provisions for recovery in the event of accidental death.

33. Mr. Sakaria's death was due to the direct effects of the psychological trauma which he suffered during the course of his travel from Washington, D.C. to Athens, Greece. Therefore, his surviving spouse Elpis Sakaria is entitled to recover the sum of $500,000 for his accidental death.

34. On January 30, 1985, Mrs. Sakaria timely made claim for benefits under the policy.

35. By letter dated August, 1987, the Allstate Life Insurance Company wrongfully denied the claim in contradiction of the terms of the policy.

WHEREFORE, the Plaintiff claims damages against Allstate Insurance Company in the amount of $500,000, plus interest, costs nd other remedies that the Court might feel appropriate.

COUNT IV

Plaintiff, Elpis Sakaria, adopts and incorporates herein the allegations contained in paragraphs 1 through 16.

36. At the time of his death, Mr. Sakaria was insured under separate life insurance policy issued by Allstate Insurance Company.

37. That policy No. 064008256, contained within it, provisions for recovery in the event of accidental death.

38. Mr. Sakaria's death was due to the direct effects of the psychological trauma which he suffered during the course of is travel from Washington, D.C. to Athens, Greece. Therefore, his surviving spouse Elpis Sakaria is entitled to recover the sum of $90,000 for his accidental death.

39. On January 30, 1985, Mrs. Sakaria timely made claim for benefits under the policy.

40. By letter dated August 31, 1987, the Allstate Life Insurance Company wrongfully denied the claim in contradiction of the terms of the policy.

WHEREFORE, the Plaintiff claims damages against Allstate Insurance Company in the amount of $90,000, plus interest, costs and other remedies that the Court might feel appropriate.

COUNT V

Plaintiff, Elpis Sakaria, adopts and incorporates herein the allegations contained in paragraphs 1 through 16.

41. At the time of his death Mr. Sakaria was insured under a life insurance policy issued by Allstate Life Insurance Company

42. That policy No. 05003145 contained within it, provisions for recovery in the event of accidental death.

43. Mr. Sakaria's death was due to the direct effects of the psychological trauma which he suffered during the course of his travel from Washington, D.C. to Athens, Greece. Therefore, his surviving spouse Elpis Sakaria is entitled to recover the sum of $250,000 for his accidental death.

44. On January 30, 1985, Mrs. Sakaria timely made claim for benefits under the policy.

45. By letter dated August 31, 1987, the Allstate Life Insurance Company wrongfully denied the claim in contradiction of the terms of the policy.

WHEREFORE, the Plaintiff claims damages against Allstate Insurance Company in the amount of $250,000, plus interest, costs and other remedies that the Court might feel appropriate.

COUNT V [sic]

46. Plaintiff, Elpis Sakaria, adopts and incorporates herein the allegations contained in paragraphs 1 through 16.

47. At the time of his death Mr. Sakaria was insured under a life insurance policy issued by Allstate Life Insurance Company.

48. That policy No. 05003031, contained within it, provisions for recovery in the event of accidental death.

49. Mr. Sakaria's death was due to the direct effects of the psychological trauma which he suffered during the course of his travel from Washington, D.C. to Athens, Greece. Therefore, his surviving spouse Elpis Sakaria is entitled to recover the sum of $10,000 for his accidental death.

50. On January 30, 1985, Mrs. Sakaria timely made claim for benefits under the policy.

51. By letter dated August 31, 1987, the Allstate Life Insurance Company wrongfully denied the claim in contradiction of the terms of the policy.

WHEREFORE, the Plaintiff claims damages against Allstate Insurance Company in the amount of $10,000, plus interest, costs and other remedies that the Court might feel appropriate.

Brault, Graham, Scott & Brault

By: /s/ Albert d. Brault
Albert D. Brault, 01041
By: /s/ M. Kathleen Parker
M. Kathleen Parker, 03524
101 So. Washington Street
Rockville, MD 20850

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ELPIS SAKARIA

v. CIVIL NO. HM-87-3302

ALLSTATE LIFE INSURANCE CO.,
et al.

* * * * * * *

MAGISTRATE'S REPORT AND RECOMMENDATION

On December 9, 1987, the plaintiff, Elpis Sakaria, filed this suit against defendants American Express Travel Related Services ("AMEX") Minnesota Mutual Life Insurance Company ("Minnesota"), and Allstate Life Insurance Company ("Allstate"). She seeks to recover money allegedly due for the death of her husband, Jagdish Sakaria, on December 29, 1985, under accidental death policies issued by these companies. The defendants' motion for summary judgment, and their related motion to strike the plaintiff's answers to requests for admissions, have been referred to me for disposition by Judge Herbert F. Murray pursuant to 28 U.S.C. §636(b) and Local Rule 301. For the reasons that follow, I will recommend that the defendants' motion for summary judgment be granted and by separate Order will grant their motion to strike the plaintiff's untimely response to the defendants' request for admissions.

Facts

In 1978 Mr. Sakaria was injured in an automobile accident resulting in a post-concussion syndrome with significant brain dysfunction. Apparently this manifested itself through a variety of symptoms including loss of memory, paranoia, depression, feelings of being threatened

by nonexistent situations, and episodes of "confabulation" or reporting nonexistent situations. (Defendants' Reply to Opposition, Attached Deposition of Spiridon Koulouris, M.D. at 8-10).

On December 26 and 27, 1985, Mr. Sakaria travelled from his home in Maryland to Athens, Greece. He flew on TWA Flight 840 ("Flight 840") from New York to Athens, with a stop in Rome, Italy. The stop in Rome was a scheduled part of the itinerary; Mrs. Sakaria, however, claims that she was told the flight would be "nonstop" to Athens.

On the morning of December 27, 1985, a terrorist attack occurred in a section on the second floor of the Rome airport terminal. Accordingly, when Flight 840 landed at the airport shortly thereafter, the plane was kept parked on a section of the airport some distance from the terminal for approximately one and one-half hours, during which the passengers were kept on the plane. The passengers apparently were told there had been an altercation, possibly an armed altercation, at the airport, but were given no further details.

The parties dispute the degree of ventilation available on the plane during this time period. In their motion for summary judgment, the defendants have submitted deposition excerpts from the captain of Flight 840 and from several passengers who testified that the temperature on the plane during the hour and a half wait was not uncomfortably warm, that the doors were open, and that there was no problem with ventilation or oxygen. (Defendants' Motion for Summary Judgment, Exhibits 13, 14, 16, 17, 18). Thereafter, the passengers continuing to Athens were taken by bus or tram to a designated area on the first floor of the terminal. That area was sealed off by security personnel and ropes.

Although the armed security personnel were visible to the travelers, the plaintiff has conceded that "in general, with possible exceptions, none of the passengers had occasion to view any of the aftermath of the terrorist attack or see any of the bodies." (Plaintiff's opposition to Defendants' Motion at 2). Passengers also testified that the mood on the airplane was calm, that while waiting inside the terminal they were not permitted to leave the designated area, and that they were never exposed to any visible signs of the bombing attack. (Defendants' Motion for Summary Judgment, Exhibits 13, 16, 17, 18).[1] No admissible evidence has been offered that Mr. Sakaria saw any of the casualties of the attack.[2]

After approximately one and a half to two hours in the designated area of the airport, the passengers were taken by bus to the aircraft used for the continuation of Flight 840 to Athens. There is no evidence that Mr. Sakaria, or any of the other passengers, sought medical attention or complained of any medical condition during the flight to Rome, while sitting in the parked aircraft, while waiting in the terminal, or during the flight to Athens.

On arrival in Athens, Mr. Sakaria was met by Mr. Nick Bafitis. Mr. Bafitis indicated that Mr. Sakaria appeared ill,

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[1]The only exception was Rev. Lee's recollection that he may have seen some bullet holes, probably when he visited the airport he[sic] day after the attack. (Id., Exhibit 13).

[2]Mr. Sakaria reportedly told Nick Bafitis, who met him at the airport, that he had seen blood and bodies on the floor and heard people screaming. He reportedly told his father-in-law that while he was enclosed in the plane, a battle was going on outside. (See unsworn statements attached as part of Exhibit 19 to Defendants' Motion for Summary Judgment).

describing his face as "yellow and red," and his eyes as "bulging and black." He stated that Mr. Sakaria was "grasping for his throat." (Id., Exhibit 19, Attachment).[3] After spending the remainder of the day in Athens with Mr. Bafitis, Mr. Sakaria spent that evening with Mr. Bafitis and Mr. Bafitis' mother. The next day, December 28, 1985, Mr. Sakaria and Mr. Bafitis drove to a village in Greece where Mr. Sakaria's mother and father-in-law lived. They stopped to visit, the plaintiff's sister along the way. Mr. Sakaria did not seek medical treatment either day. Sometime in the early morning hours of December 29, 1985, more than one and a half days after the stopover in Rome, Mr. Sakaria was found dead in bed by his parents-in-law. The doctors who performed the autopsy attributed the death to an acute myocardial infarction. (Id., Exhibit 20).

As of December 29, 1985, Mr. Sakaria was covered by various life insurance policies which contain specific provisions for benefits in the case of accidental death. The plaintiff, Mrs. Sakaria, filed a claim for those benefits in early 1986. The claims were denied.

The defendants do not dispute that Mr. Sakaria was insured under the policies, or that the policies provided coverage for accidental death. They deny, however, that Mrs. Sakaria has shown her husband's death was the result of an accidental injury, directly and independently of all other causes, as required by the policies.

To prove causation, the plaintiff relies on the opinion of H. Brandis Marsh, M.D., a cardiologist. By letter dated

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[3]No affidavit or deposition testimony from Mr. Bafitis has been submitted.

December 23, 1988, Dr. Marsh opined that Mr. Sakaria died "as a result of a rhythm disorder caused by a myocardial infarction provoked by the circumstances of travel," from which Dr. Marsh inferred, within his understanding of the meaning of the word, that the death was "accidental". Dr. Marsh, who reviewed no deposition testimony, relied on two crucial assumptions: 1) that Mr. Sakaria spent one and a half hours in a closed airplane at the Rome airport with no air conditioning or air circulation, resulting in an extremely warm and oppressive atmosphere, and 2) that when Mr. Sakaria disembarked from the plane, he walked through the airport where he saw "rather graphic evidence of the carnage caused by the bombing." (Id., Exhibit 15). Dr. Marsh also relied on Mr. Bafitis' report that Mr. Sakaria complained of discomfort in his throat, described as a sense of dryness, when he arrived in Athens. On deposition, however, Dr. Marsh testified that if the hour and a half on the runway was not characterized "by a heat stifling environment etc.," and the mood on the plane was quiet and calm, and further that Mr. Sakaria never saw any of the carnage or bodies and heard no shooting or grenades, that it would alter his opinion, and he would no longer subscribe to the opinion expressed in his letter of December 23, 1988. (Id., Exhibit 19 at 43-44).

I. Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that:

> (Summary judgment) shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

> moving party is entitled to a judgment as a matter of law.

As recently stated by the Supreme Court, this does not mean that any factual dispute will defeat the motion:

> By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2511 (1986) (emphasis in original).

Moreover, the Supreme Court has explained that the Rule 56(c) standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 56(a): "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., supra, 106 S.Ct. at 2511; White v. Rockinaharn Radiologists, Ltd., 820 F.2d 98, 101 (4th Cir. 1987). "The party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Rivanna Trawlers Unlimited v. Thompson Trawlers, 840 F.2d 236, 240 (4th Cir. 1988). Further, the court has an affirmative obligation to prevent factually unsupported claims and defenses from proceeding to trial. Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987), citing, Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553 (1986). "[A] defendant...should not be required to undergo the considerable expense of preparing for and participating in a trial" unless the plaintiff has

produced "evidence on which a jury might rely" in support of the claims alleged. E.F. Hutton Mortgage Corp. v. Equitable Bank, 678 F.Supp. 567, 573 (D.Md. 1988).

II. Causation

The plaintiff bears the burden of proving that her husband's death was "accidental" within the meaning of the coverage provided by the policies. See Questech, Inc. v. Hartford Acc. and Indem. Co., 713 F.Supp. 956, 964 n.20 (E.D.Va. 1989). The relevant language is set forth as follows:

AMEX Policy:

> "Injury means bodily injury which:
> . . . c. creates a Loss due, directly and independently of all other causes, to such accidental bodily injury.

Minnesota Mutual Policy:

> "Death by accidental injury" as used in this policy means that the insured's death results directly and independently of all other causes from an . . . accidental injury which was unintended, unexpected, and unforeseen . . . In no event will we pay the accidental death benefit where the insured's death results from or is caused directly or independently by any of the following:
>
> (3) bodily or mental infirmity, illness or disease.

Allstate Policy:

> Injury ~ means bodily injury caused by an accident occurring while the insurance is in force and which injury results . . . directly and independently of all other causes, in any of the losses to which the insurance applies, to wit, death . . .

(Defendants' Motion for Summary Judgment, Exhibits 4-9).

Assuming for the moment that the events in Rome could be considered an "accident," proof that such events directly and independently caused Mr. Sakaria's heart attack would be sufficient for Mrs. Sakaria to recover benefits. The Court of Appeals of Maryland recently reiterated its holding that:

> (W)here the death is from a disease which was itself caused by the accident, the latter is to be regarded as the true and predominant cause of the death, and the disease as a mere link in the chain of causation, and the death is to be regarded as having resulted solely from the accident independently of all other causes. General Acc. Co. v. Homely, 109 Md. 93, 99, 71 A. 524 (1908).

Cheney v. Bell National Life Ins., 315 Md. 761, 556 A.2d 1135, 1137 (1989).[4] In the case of a hemophiliac who died after receiving contaminated blood, the Cheney court stated: "Assuming that the transfusion of contaminated blood or blood products into the insured constituted an accidental injury within the meaning of the policy, the AIDS and

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[4]The parties have not disputed that Maryland law controls in this case.

pneumonia caused thereby are considered in 'link(s) in the chain of causation,' and the accidental injury remains the cause of death." Id. With the alteration of Dr. Marsh's opinion in the face of more accurate facts, however, the plaintiff has not advanced sufficient evidence of causation to survive a motion for directed verdict. Consequently, she cannot survive a motion for summary judgment.

Moreover, it appears that Dr. Marsh was not advised of the confabulation or paranoia Mr. Sakaria exhibited as a result of his prior injury. If Mr. Sakaria reported the events in Rome to his relatives in Athens as alleged, it appears likely that his distorted perception of those events, and any resulting stress, were not caused "independently" of his underlying mental illness.

III. "Accidental" Death

Under Maryland law, insurance policies are construed like other contracts. The intention of the parties is to be determined from the policy as a whole, and words are to be given their usual, ordinary, and accepted meanings unless there is evidence that the parties intended otherwise. Cheney v. Bell, supra, 556 A.2d at 1138. If there is an ambiguity, it will be construed against the drafter, but Maryland does not follow the rule that an insurance policy is to be construed most strongly against the insurer. Id.

In this case, it may be doubted that the events at the Rome airport were accidental within the ordinary meaning of the word. See American Home Assur. Co. v Osbourn, 47 Md. App. 73, 422 A.2d 8, 13 (1980) (trespass and conversion not an "accident"). The actions of the terrorists were deliberate and criminal; the actions of the pilot and airport officials in landing the plane, parking it at a distance

from the terminal, and keeping the passenger in a secure area inside the terminal, were also deliberate and, intended to insure the passengers' safety. It is not necessary to resolve the distinction between "accidental means" and "accidental result," however,[5] because the plaintiff has not offered sufficient evidence of independent causation in any event.

IV. Request for Admissions

On September 1, 1989, the defendants served requests for admissions on the plaintiff. No response was filed until October 23, 1989, more than 30 days after service and also after filing of the defendants' motion for summary judgment. The plaintiff did not request permission from the court for late filing.

Fed. R. Civ. P. Rule 36(a) provides that requests are deemed admitted unless a response is filed within 30 days, or such shorter or longer time as the court may allow. The defendants accordingly relied on the admissions in their motion for summary judgment and have filed a motion to strike the plaintiff's untimely answers.

Late filing may be permitted unless the opposing party shows material prejudice from the delay. See, e.g., Donovan v. Porter, 584 F.Supp. 202, 207-08 (D.Md. 1984). In this case, however, the plaintiff has not opposed the defendant's motion to strike, nor has she moved to withdraw her admissions. See United States v. Kasuboski, 834 F.2d 1345, 1350 (7th Cir. 1987). The defendants have asserted prejudice if forced to continue discovery in an attempt to prove the matters admitted, and because of their reliance on

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[5]See Cheney v. Bell, supra, 556 A.2d at 1138 n.2.

the admissions in moving for summary judgment.[6] Under the circumstances, the defendants' motion will be granted.

V. Conclusion

For the reasons stated above, it is hereby recommended that defendants' motion be granted and judgment be entered for the defendants. The defendants' motion to strike will be granted by separate Order.

January 10, 1990

/s/ Catherine C. Blake
Catherine C. Blake
United States Magistrate

[6]I did not find it necessary, however, to rely on the plaintiff's admissions in recommending summary judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ELPIS SAKARIA

v. CIVIL NO. HM-87-3302

ALLSTATE LIFE INSURANCE COMPANY,
et al.

* * * * * * *

ORDER

The Court has considered the Report and Recommendation of Magistrate Blake, dated January 10, 1990, in the above-captioned case and no objections have been filed within the time allowed by law. See Fed. R. Civ. P. 72. Having reviewed the file, the Court will accept the conclusions and findings of the Magistrate. Accordingly, it is this 12th day of February, 1990, by the United States District Court for the District of Maryland,

ORDERED:

(1) that the Report and Recommendation of the Magistrate be, and the see hereby is, Affirmed and Adopted;

(2) that defendants' Motion for Summary Judgment be, and the same hereby is, Granted;

(3) that judgment be, and the same hereby is, Entered in favor of defendants and against the plaintiff; and

(4) that the Clerk of the Court shall mail a copy of this Order to the parties.

/s/ Herbert F. Murray
Senior United States District Judge

Statement of Labros Stamoulis

The following is the substance of my interview with Mrs. Sakaria's father on Saturday, August 9, 1986: (through Mrs. Sakaria as interpreter since her father does not speak English)

When I saw Jack I asked him if he was all right, and how was his trip. Jack said it was a miracle that he was still alive. He told of being enclosed in the plane and a battle was going on outside of the plane. He said "You can't imagine father, the bodies and blood all over. They were using hand grenades and automatic guns. How did we get out of it alive." "They closed us inside the plane and I couldn't breathe. And after I did get out I still could not breathe. I was scared to death - terrified."

When I saw Jack he still had bad color in his face.

Jack was "on his feet" after arrival in the village only about 1 1/2 hours, all the time talking about Rome. Then he wanted to lie down - said he felt sick.

Jack got up about 4:30 a.m. (he had slept in the same room as his wife's parents) and went to the bathroom. He then returned to bed and was found dead in the morning.

Labros Stamoulis
father of Mrs. Sakaris [sic]

/s/ Labros Stamoulis 9/15/86

Statment of Nicholas Bafitis

The following is the substance of my interview with Mr. Bafitis on Saturday, August 9, 1986:

When Jack got off the plane in Athens and came into the terminal, I could hardly recognize him by his face. It was yellow and red, his eyes were bulging, were completely black with big circles and swelling around his eyes. He was grasping for his throat and looked quite sick.

Perhaps I should have taken him to a doctor, but I thought he was just overly tired from his trip.

When he first saw me he said "You wouldn't believe what happened to us." I said "No, I have no idea". He stopped in the middle of the waiting room and began to tell me. He said he saw the blood, the bodies on the floor, people screaming -". He said he felt so bad about it - the first time in his life he had ever seen anything like that.

He said he had been forced to stay in the aircraft without any air, with the engines shut down, no circulation. His throat got awfully dry. He was holding his throat when I met him.

Jack wanted to call his wife right away, but I told him to calm down and we would call her from my home.

My home is not far from the airport, and when we arrived there my mother offered him some lemonade - afterwards he asked for some tea.

On the way from the airport and all during our stay at my mother's house he kept repeating and repeating over and

over again his account of the Rome incident and acted as though it was still going on.

I called Jack's wife from my mother's house and tried to break the news gently to his wife before putting Jack on. I told her what had happened at Rome but that Jack was all right and was right here to talk with her. Jack then talked with his wife and told her not to worry - that he was lucky to be alive - that he could not tell her all about it over the phone - but that he was here now and all right.

At my mother's house in Athens Jack went to bed in a room by himself, about 10:00 p.m. In the morning I went into the room to waken Jack and when I just touched him he jumped up in a terrified way. He seemed to be in a daze. He ate no breakfast, just had some coffee. He looked the same as he did when I met him at the airport.

We then left for the village to see his children, and on the way he kept telling me about the Rome incident during the four hours of riding. I offered to let him drive, just to get his mind off the incident. Again and again he kept saying "Nick, it is a miracle that I am alive." Again and again he referred to all the blood he had seen.

At the village I told Mrs. Sakaria's father that something was wrong with Jack and perhaps they should take him to see a doctor. When his wife's father and mother had seen Jack in Silver Spring, Maryland September 15, his attitude was reserved as was customary. When he saw them at the village he hugged them both, emotionally - an act which surprised them.

I had seen Jack on December 20 or 21, in Silver Spring, Maryland, but when I saw him at the airport in Athens

December 27, he looked altogether different. He really looked sick.

My mother called Mrs. Sakaria's sister in the village the day after Jack died and stated that he had looked sick and had thought he should have seen a doctor.

/s/ Nick Bafitis

Supreme Court, U.S.
FILED
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(3)

No. 92-489

In The

Supreme Court of the United States

October Term, 1992

ELPIS SAKARIA,

Petitioner,

v.

ALLSTATE LIFE INSURANCE COMPANY
MINNESOTA MUTUAL LIFE INSURANCE COMPANY
AMEX LIFE ASSURANCE COMPANY,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITIONER'S BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Jay S. Bybee
6515 Millstone Drive
Baton Rouge, LA 70808
(504) 388-8701

Ronald D. Maines
(Counsel of Record)
Maines & Harshman, Chrtd.
Suite 900
2300 M Street, N.W.
Washington, DC 20037
(202) 223-2817

Attorneys for Petitioner, Elpis Sakaria

November 2, 1992

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In The

Supreme Court of the United States

October Term, 1992

No. 92-489

ELPIS SAKARIA,

Petitioner,

v.

ALLSTATE LIFE INSURANCE COMPANY
MINNESOTA MUTUAL LIFE INSURANCE COMPANY
AMEX LIFE ASSURANCE COMPANY,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITIONER'S BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioner has demonstrated that the lower court, in sanctioning Mrs. Sakaria under the "bad faith" exception to the American Rule, based its judgment on a finding that Mrs. Sakaria's actions were not objectively reasonable. The "objectively reasonable" standard is, of course, the standard for sanctions under Rule 11, not for sanctions under the American Rule, which demands proof of malice or vexatious purpose. Petitioner further showed that Mrs. Sakaria was sanctioned

for continuing her suit through summary judgment, while her attorney was sanctioned for failing to advise her to dismiss the suit -- a fundamentally unfair result.

Respondents have failed to address these points squarely. Indeed, they virtually ignore the thrust of Petitioner's first question, arguing instead, that the issue was not raised below and thus waived (Br. in Opp. 8-11) and that in any event the Court should review the lower court's plain error of law for "abuse of discretion." (Br. in Opp. 12-16). As to Petitioner's second ground for review, Respondents do not contest the incongruity in the district court's stated position. Rather, they revisit the evidence in an effort to show that "the litigation was driven by [Mrs.] Sakaria rather than her counsel." (Br. in Opp. 17). There is no merit to Respondents' objections.

1. Respondents first contend that Mrs. Sakaria's claim with respect to the proper legal standard for imposing sanctions under the American Rule should be denied because the question is raised for the first time in this Court, and has therefore been waived.[1] The general principle on this score is well established. Ordinarily a party may not raise on appeal questions not passed upon by the lower courts. The rule is pragmatic and is grounded in the idea that presenting a question for the first time on appeal deprives the parties of an opportunity to present evidence to the lower courts. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

But these "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. at 557. "Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Ibid.*

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1 Respondents' objection applies only to Petitioner's first question presented.

Thus, "the rule is not inflexible" (*Youakim v. Miller*, 425 U.S. 231, 234 (1976)) and the Court retains "the power to notice a 'plain error' though it is not assigned or specified." *United Brotherhood of Carpenters and Joiners of America v. United States*, 330 U.S. 395, 412 (1947) (footnote omitted). This is particularly true where the question is "purely legal" (*Mitchell v. Forsythe*, 472 U.S. 511 (1985)), and represents "an important, recurring issue" and "[t]he interests of judicial administration will be served." *Carlson v. Green*, 446 U.S. 14, 18 n.2 (1980).

Petitioner's raising for the first time in this Court the issue of the proper legal standard for imposing sanctions under the "bad faith" exception works no unfairness. Moroever, there are compelling reasons for the Court to review a question of law lying at the heart of the courts' inherent powers.

First, the "applicable standard" question is a straightforward issue of law. It does not require, nor would its resolution be served by, an opportunity for Respondents to introduce additional evidence. Hence, neither Petitioner nor Respondents would be prejudiced in any fashion by the Court's addressing this question.

Second, and most significantly, the issue may properly be raised at this stage of the litigation because it goes to the exercise of the *inherent powers* of the courts below. *See Chambers v. NASCO, Inc.*, 501 U.S. ___, 111 S.Ct. 2123 (1991). In this respect, Petitioner's raising this issue is analogous to challenging a court's subject matter jurisdiction, *see, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694 (1982); Fed. R. Civ. P. 12(h)(3) (objections to subject matter jurisdiction are not waived and may be raised at any stage of the proceedings); or challenging a court's power under the "case or controversy" proviso of Article III of the Constitution. Because these are matters which go to the very core of the courts' constitutional and statutory powers to hear a case or mandate relief, they cannot be waived.

The propriety of a court's exercise of its inherent powers is logically prior even to these fundamental notions, for inherent powers "'are those which are necessary to the exercise of all others.'" *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (citations omitted); *see also Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 819-20 (1987) (Scalia, J., concurring) (inherent powers are those "necessary to permit courts to function").

The power to sanction under the American Rule is part of the courts' "'implied power'" and is "'governed not by rule or statute but by the control necessarily vested in the courts to manage their own affairs....'" *Chambers*, 111 S.Ct. at 2132 (*quoting United States v. Hudson*, ___ U.S. (7 Cranch) 32, 34 (1812), and *Link v. Wabash RR. Co.*, 370 U.S. 626, 630-31 (1962)). Accordingly, the Court has warned that "[b]ecause of their very potency, inherent powers must be exercised with restraint and caution" and, in particular, has indicated that the inherent power to sanction parties is "narrowly defined." *Chambers*, 111 S.Ct. at 2133.

The abuse of a court's inherent power to sanction should command this Court's attention at least to the same extent as would objections raised on the non-waivable grounds noted above. Indeed, the former is potentially more troublesome. The courts' exercise of their inherent powers is unenlightened by the strictures of any limiting legislation (as with subject matter jurisdiction) or this Court's clear guidance as to constitutional constraints (provided by the "case or controversy" requirement). As Justice Kennedy, joined by Chief Justice Rehnquist and Justice Souter noted in *Chambers*, Rule 11 "establish[es] explicit standards for, and explicit checks against, the exercise of judicial authority. By contrast, courts apply inherent powers without specific definitional or procedural limits." 111 S.Ct. at 2145 (Kennedy, J., dissenting). This state of affairs compromises a litigant's right to fair notice of proscribed conduct and jeopardizes the possibility of meaning-

ful judicial review for misapplication of the "bad faith" exception.

That the petition raises an issue of substantial importance is also evident in the careful attention which this Court has devoted to sanctions-related cases in the last three terms. Since 1989, the Court has issued no fewer than four decisions in this evolving area. *Chambers v. NASCO, Inc., supra; Business Guides v. Chromatic Communications Enterprises, Inc.*, 498 U.S. ___, 111 S.Ct. 922 (1991); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1989), and *Pavelic & Leflore v. Marvel Entertainment Group*, 493 U.S. 120 (1989).

Left unanswered by the recent cases is the question raised by Mrs. Sakaria's petition: When a court elects to exercise its inherent powers to sanction a litigant under the "bad faith" exception to the American Rule -- a non-statutory predicate for sanctions -- is "objective reasonableness" the proper standard? The confusion sown by the lower courts in this case is attributable to "how little guidance or limitation the undefined bad faith predicate provides." *Chambers v. NASCO, Inc.*, 111 S.Ct. at 2145 (Kennedy, J., dissenting).

The district court below plainly failed to observe the narrow definitions of its own inherent powers. The question presented by Petitioner is significant; it is one of law, not fact; and no conceivable prejudice can follow from this Court's clarifying the proper boundaries of the lower courts' authority to sanction under the "bad faith" exception.

2. In their opposition, Respondents have failed to address the central problem raised by Mrs. Sakaria's petition. The district court, after sanctioning Mrs. Sakaria's counsel under Rule 11, stated that Mrs. Sakaria was being sanctioned under the "bad faith" exception to the American Rule: "Sanctions are warranted against Mrs. Sakaria under the *bad faith exception* because of her misleading statements during

discovery and her continuation of this warrantless suit." Pet. App. 8a-9a (emphasis added). In the very next sentence and in unequivocal language, the district court offered its rationale: "[P]laintiff and her counsel, Mr. Huffman, continued this litigation ... well beyond that point where an *objectively reasonable person* would have dismissed the case." Pet. App. 9a (emphasis added).

Had the district court put the point less plainly, there might be at least a colorable basis for Respondents' suggestion that the court had merely invoked the concept of objective reasonableness inartfully. But the district court's conclusion is not ambiguous on this point. Moreover, it is difficult to conceive that both the magistrate and the district court could have employed the notion of objective reasonableness -- an elemental legal concept -- carelessly and without intending fully that the term be given its ordinary legal meaning.

Remarkably, elsewhere in their Opposition, Respondents reluctantly, or at least inadvertently, concede the point. Respondents' footnote 5 reads in full:

> [Mrs.] Sakaria does not address that the court recommended sanctions both under Rule 11 and the bad faith exception. See Pet. App. 19a-20a. [Mrs.] Sakaria does not argue that the Rule 11 sanctions, based on signing misleading Answers to Interrogatories, are inappropriate. However, the court did not distinguish between sanctions warranted under Rule 11 and those warranted under the bad faith exception.

Br. in Opp. 13 n.5. Respondents' first statement is incorrect; the magistrate did not recommend sanctions against Mrs. Sakaria under Rule 11. *See* Pet. App. 22a. The district court's ruling on this score is equally straightforward. Pet. App. 8a.

It is true that, as Respondents point out in this footnote, the magistrate referred generally to the standards for both Rule 11 and the "bad faith" exception (*see* Pet. App. 19a-20a), but this is unremarkable since the magistrate recommended sanctions against counsel under the one provision and against Mrs. Sakaria under the other. The genesis of the problem brought to light in the petition, however, is precisely as Respondents themselves state it: "[T]he court did not distinguish between sanctions warranted under Rule 11 and those warranted under the bad-faith exception." Br. in Opp. 13 n.5. Because the district court collapsed the Rule 11 and "bad faith" analyses into a single inquiry, the court applied the wrong standard to the "bad faith" sanction.

The district court's conflation of the two standards is not surprising. As Justice Kennedy pointed out in *Chambers*, the "undefined bad faith predicate" offers "little guidance" to courts prepared to exercise their inherent powers. 111 S.Ct. at 2145 (Kennedy, J., dissenting). Thus, it is not difficult to see how the clearly defined standard for Rule 11 cases proffered in *Business Guides v. Chromatic Communications Enterprises, Inc.*, *supra*, might be misapplied to cases involving the courts' inherent powers.

Respondents' arguments in opposition to the petition miss the mark in other respects as well. Respondents assert, for example, that the appropriate standard for review in this context is abuse of discretion. Br. in Opp. 12. This is plainly incorrect. Abuse of discretion is a fact-oriented assessment. Thus, had Mrs. Sakaria argued that the lower court improperly evaluated the evidence upon which the sanctions were based, abuse of discretion would be the operative standard. But that is not Petitioner's argument. Rather, Mrs. Sakaria has demonstrated that the district court applied the wrong legal standard to the facts. For this reason, Respondents' claims that the magistrate "was able to consider and weigh, first hand, Sakaria's testimony, demeanor and conduct" or that the district

court "was in the best position to assess the circumstances justifying sanctions" (Br. in Opp. 12) are irrelevant.

3. Finally, Respondents assert that the district court's express finding that Mrs. Sakaria's counsel, Mr. Huffman, "failed to advise plaintiff to dismiss the case in light of a lack of admissible evidence" (Pet. App. 8a) has "no colorable basis" and "does not warrant consideration" by this Court. Br. in Opp. 16. This claim is ill-conceived. The district court's *Memorandum*, which the district court judge characterized as the product of his "conduct[ing] a *de novo* review of the record in this case," Pet. App. 7a, says what it says. To the extent that Respondents disagreed with the district court's findings in this connection, they were free to file their own objections on appeal. But Respondents' challenge to the facts in this procedural setting has no relevance to the Court's decision whether to review this case.

Mrs. Sakaria's point remains. Assuming, *arguendo*, that an "objective reasonableness" standard for the "bad faith" exception were valid, it is manifestly unreasonable to sanction a represented party for failing to dismiss her lawsuit when the party's attorney is sanctioned for failing to advise her to dismiss the suit. As the Court noted in *Business Guides*, "[W]hat is objectively reasonable for a client may differ from what is objectively reasonable for an attorney." 111 S.Ct. at 933 (citation omitted). Because this result offends basic fairness, it should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jay S. Bybee
6516 Millstone Drive
Baton Rouge, LA 70808
(504) 388-8701

Ronald D. Maines
(Counsel of Record)
Maines & Harshman, Chrtd.
Suite 900
2300 M Street, N.W.
Washington, DC 20037
(202) 223-2817

Attorneys for Petitioner,
Elpis Sakaria

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